THE NATIONAL GOVERNMENT OF THE UNITED STATES

WILLIAM BENNETT MUNRO

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THE NATIONAL GOVERNMENT OF THE UNITED STATES

BY THE SAME AUTHOR

THE GOVERNMENTS OF EUROPE
THE GOVERNMENT OF EUROPEAN CITIES
THE GOVERNMENT OF AMERICAN CITIES
MUNICIPAL ADMINISTRATION
PERSONALITY IN POLITICS

THE NATIONAL GOVERNMENT OF THE UNITED STATES

BY

WILLIAM BENNETT MUNRO

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FOURTH EDITION

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PREFACE

My aim in this book has been to provide a broad survey of the principles and practice of American government. To that end an endeavor has been made to explain the origin and purpose of the various governmental institutions as well as to indicate what they are, what they are designed to do, and how they do it. American government in this volume is pictured as a going concern, with merits and defects which have been developed by law or usage and realities which do not always square with the ideals. On the other hand the shortcomings of the American political system are certainly not more numerous nor more conspicuous than are those of other governments in the present-day world.

The plan, scope, content, and temper of this book are in large measure the outgrowth of my experience as a teacher during the past thirty-five years. My students, by the drift of their questions and discussions, have moulded my ideas as to what a textbook ought to contain. This book is theirs as much as it is mine. That fact may help to explain why the same topic is sometimes taken up more than once, from different points of approach, in different chapters. It is not unconscious repetition but the outcome of a desire to stamp on the reader's mind some things that I have found to be all-too-elusive.

For this fourth edition the text has been entirely rewritten. Some new chapters have been added; a considerable amount of fresh material has been incorporated; while the emphasis has been shifted in keeping with the new political and economic orientation of the past few years. The lists of bibliographical references at the close of each chapter have been rearranged and extended.

The one thing that has not undergone a change is my conception of what a textbook ought to be. It is still my conviction that the history, organization, and actual workings of a government are so closely interwoven that they should be studied together, not as independent and dissociated matters. I also confess that I have consciously tried, although perhaps with indifferent success, to make this volume reasonably interesting, as textbooks go. For I have learned, during an active lifetime of contact with college

undergraduates, that there are many among them who do not mistake dullness for erudition or confuse specific gravity with educational usefulness.

The charts which appear in certain chapters of the book have been made by my colleague, Professor Philip S. Fogg. Mrs. Ethel H. Rogers has greatly assisted me in preparing the manuscript for the press, checking the lists of references, and making the index.

WILLIAM BENNETT MUNRO.

PASADENA, CALIFORNIA,
Washington's Birthday,
1936.

CONTENTS

INTRODUCTORY

CHAPTER PAGE

I. The Study of Government: Why and How . . . 1

BACKGROUND AND BASIS OF AMERICAN GOVERNMENT

II. The Background and Beginnings of American Government 14

III. The Emergence of American Nationalism . . . 28

IV. The Constitution and Its Makers 40

V. "The Supreme Law of the Land" 61

VI. How the Constitution Has Grown 74

FOUNDATIONS OF POLITICAL POWER

VII. Citizenship and Civil Rights 89

VIII. The Electorate and the Suffrage 106

THE NATIONAL PARTY SYSTEM

IX. Political Parties: History and Functions . . . 122

X. Political Parties in National Government: Organization and Methods 140

THE NATIONAL EXECUTIVE

XI. The President 156

XII. Presidential Powers and Duties 181

XIII. The Cabinet and the Departments 213

XIV. The Independent and Emergency Administrative Services 240

THE ORGANIZATION OF CONGRESS

XV. The Senate: Its Organization 261

XVI. The Senate: Its Functions 278

XVII. The House of Representatives: Its Organization . 296

XVIII. The House of Representatives at Work . . . 313

CONGRESS IN ACTION

CHAPTER		PAGE
XIX.	The General Powers of Congress	335
XX.	Federal Taxation and Revenues	351
XXI.	National Expenditures and the National Debt	369
XXII.	Currency, Banking, and Credit	387
XXIII.	The Regulation of Commerce	409
XXIV.	Industry, Agriculture, and Labor	435
XXV.	The National Defense	453
XXVI.	The Postal Power and Other Federal Functions	465
XXVII.	Constitutional Limitations	477
XXVIII.	The Territories, Insular Possessions, and National Capital	490

THE NATIONAL JUDICIARY

XXIX.	The Judicial System of the United States	507
XXX.	The Supreme Court and the Other Federal Courts	525

CONCLUSION

XXXI.	The American Philosophy of Government	545

APPENDIX

	The Constitution of the United States	563
	Index	577

THE NATIONAL GOVERNMENT OF THE UNITED STATES

THE NATIONAL GOVERNMENT OF THE UNITED STATES

CHAPTER I

THE STUDY OF GOVERNMENT: WHY AND HOW

This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources.—*Blackstone.*

What is government and why should anyone study it? It is not easy to answer the first half of that question—to give a definition which will include all that comes under the head of government and exclude everything that does not. Nevertheless a definition is an essential starting-point in the scientific discussion of any subject, for there is nothing more confusing than the use of undefined terms which may mean different things to different people. Such terms, for example, as government, politics, administration, and democracy are sometimes so loosely used that they create no end of confusion.

What is government?

Government is the mechanism through which the public will is expressed and made effective. Sometimes the public will is voiced by the people directly, through the agency of the initiative and referendum, but more often it is made manifest by action of their elected representatives in parliaments, legislatures, and municipal councils. Constitutions, laws, and ordinances are the formal records of the public will as expressed by these legislative bodies. Presidents, governors, mayors, and other executive officials constitute the channels through which this legislation is put into effect, while the courts uphold their hands by providing the sanction of enforcement.

The agency of public action.

Government, accordingly, embraces three broad functions, namely, the making of laws, the administration of laws, and the enforcement of laws. Laws embody the mind of the people's representatives on matters of public policy, declaring what shall be done and what shall not be done. But laws are not self-starting

Its broad scope.

devices; they have no momentum of their own. Hence administrators are vested with the function of putting the laws into operation. The vast majority of governmental officers are engaged in this work. And when anyone shows a reluctance to obey the laws it is the courts that provide the machinery of enforcement. Legislative, executive, and judicial, therefore, are the three great branches of government. The study of government is equally concerned with all of them.

Why study this subject?

The study of government as a means of gaining an acquaintance with a great domain of human activity.

Such a study has several purposes. The first is to secure an acquaintance with a highly important field of human activity. Government has become an all-pervading social enterprise. It reaches into all phases of the citizen's everyday life. For it is government that gives him his citizenship, protects him awake or asleep, guards his health, provides him with education, limits his hours of labor, and regulates his conduct in an ever-increasing variety of ways. There was a time, not so long ago, when government was looked upon as a passive factor in the common life. Its functions were deemed to be largely protective. It defended its people against foreign enemies and kept peace within the nation's borders. For the rest it was supposed to laissez-faire, to let alone. But that concept of government, which served well enough in earlier days, is wholly unsuited to the complexities of modern industrial civilization. It has broken down in the face of a thousand demands from the people for all sorts of new governmental service ranging from the guarantee of bank deposits to the enforcement of collective bargaining in labor disputes.

So today one should not think of government as an agency whose function is mainly to protect and restrict. The civil employees of the nation outnumber the army and navy twice over. Their work covers a very wide range, but much of it is intended to promote and construct, to encourage and stimulate, rather than to prevent or prohibit. Thus government has ceased to be a political agency alone and has developed into an economic and social force of tremendous power.

Extent of this activity.

In this sense government has become one of our great American industries. It engages the full time of over three million people. One person in every twelve adults is on a government payroll, national, state, or local. This huge army of public employees includes not only congressmen, judges, governors, mayors, and so forth but many thousands of postmen, policemen, and school

teachers. Government also absorbs the part-time energies of a great many more persons in a non-official capacity,—if one includes members of party committees, lobbyists and legislative agents, lawyers who appear before the courts, and politicians of every stripe.

What it costs.

Government is also a great industry in the sense that it spends vast amounts of money. The combined expenditures of the American national, state, and local governments during recent years have been at least twelve billion dollars annually. A good deal of this has been borrowed money, but the proportion which is raised by taxation takes a large slice from the net earnings of the people. It would be a fair estimate that about fifteen cents, on the average, out of every dollar earned by corporations, partnerships, and individuals in the United States goes to pay for what we get from the government in nation, state, county, city, town, or district. Surely an enterprise which takes so heavy a toll from the earnings of the people ought to have careful scrutiny on the part of those who contribute the money. Government should be studied, therefore, because of its intimate relationship to the pocketbook of every citizen. In this connection it is well to bear in mind that it is not merely the direct taxpayer who defrays the cost of government. Everyone is an indirect taxpayer and hence contributes to it in the cost of living.

The study of government as a form of training in the appraisal of facts and the weighing of arguments.

A second reason for the study of government is its value as a form of training in the art of observing and evaluating social facts, weighing arguments and detecting flaws in them, forming intelligent opinions on public questions, and doing various other things which every citizen in a democracy is supposed to do but very often does not. The art of understanding a political problem does not come by intuition. It has to be acquired, and the only way of acquiring it is by study and practice. The data of political science are rarely exact, and hence have to be handled with discrimination. For if they are handled loosely they lead to false conclusions.

Two and two do not always make four in politics. They may make 22. It all depends on the way you set the figures up. In other words the organization and operations of a government are not for the most part conducted on a basis of what is logical or rational. Government is an affair of human contrivance. As such it must reckon with the limitations of human nature. It rests on the caprice, as well as on the consent, of the governed. It is guided by human emotion to an even greater extent than by human

reason. Hence the factors which influence the operations of a government are to a considerable degree uncertain, variable, and incapable of precise measurement.

The art of forming sound opinions.

Now it is well that somewhere in the process of education there should be opportunity for training in the appraisal of these emotional forces. In mathematics and in the natural sciences we deal with quantities and forces which can be accurately computed. The student of physics or chemistry learns that a certain cause or combination of causes will produce a given result. There are no emotional factors to be considered. So with the student of languages and literature. He discovers that certain grammatical forms must be used to build correct sentences; he deals with rules of grammar which are absolute and with principles of composition which are generally agreed upon.

But the study of government is not a matter of learning formulas and applying them. One is expected, above all things, to avoid formulas. It is a matter of detecting tendencies and sensing the interplay of popular inclinations. In the study of government it is rarely possible to proceed directly from cause to consequence, or to trace a consequence with certainty back to its cause. Results are usually brought about by the interaction of several causes and it is by no means easy to determine just how much each has contributed to the outcome.

The separation of knowledge from superstition.

This does not mean, of course, that there are no recognized principles or laws in political science as in the natural sciences. There must be laws, or fundamental forces, in politics, for laws are the most universal of all phenomena. This universe is governed by laws, and man is part of the universe. We have biblical assurance that "the wind bloweth where it listeth," but the meteorologist of today knows that it does nothing of the kind. It blows from a high-pressure to a low-pressure atmospheric area, always and everywhere—thus obeying a fundamental law. Once upon a time it was the universal belief that epidemics of disease were scourges sent by the gods. Everyone who has read Homer's *Iliad*, for example, will recall how the sun-god in anger raised his terrible bow, and with every twang of the bowstring sent brave men to their death by pestilence while their comrades offered prayers and sacrifices to propitiate the enraged deity. Today we do not offer sacrifices to the sun-god, but send health experts to find the major routes of infection.

Every student of history has noted the regularity with which radicalism and reaction in government have followed on each other's heels throughout the ages.

The cycle of radicalism and reaction.

> "This is the moral of all human tales:
> 'Tis but the same rehearsal of the past,
> First Freedom, and then Glory—when that fails,
> Wealth, vice, corruption—barbarism at last!
> And History, with all her volumes vast,
> Hath but one page."

The relapse from Freedom and Glory does not always descend to Vice and Barbarism, as Lord Byron suggests, but the fairly regular alternation of prosperity and depression, conservatism and liberalism, high political ideals and low, democracy and dictatorship, militarism and pacifism—this alternation is one of history's outstanding phenomena. And it can hardly be the outcome of chance, or even of human perversity. May it not be that many of our political vicissitudes are merely the workings-out of forces which mankind does not yet sense or understand? Is it possible that we are still being guided, in the realm of government, too largely by formulas and superstitions which have no rational basis?

The nature of political principles.

It may be so, although the principles which government obeys (if there are such) can never be so definite as are those of physics or chemistry because of the emotional factors which are so largely involved. Yet one should not lay too much stress upon the eccentricities of political action due to the human equation, for human nature is after all a reasonably stabilized affair. We recognize this in the saying that it is the same the world over. Men and women, in the mass, respond to the same stimulus in much the same way everywhere. The political action and attitude of a single voter cannot easily be forecast, but the action and attitude of a million voters are not beyond reasonable accuracy of prediction when all the discoverable forces are assembled and impartially weighed.

Can they be embodied into a science?

The study of government can be pursued in a scientific way even though its principles are not always of universal application and sometimes fail to hold good. The weather displays strange vagaries at times and fails to perform as predicted, yet we have a science of meteorology. The eccentricities of public opinion are no more striking than are those of the lower atmosphere. The average citizen is too much given to the habit of regarding his

government as something that functions according to neither rhyme nor reason, a huge network of laws and regulations, personalities and activities, which possesses very little coherence and is guided by the opportunism of partisan advantage. He is inclined to look upon politics as neither a science nor an art but merely as a game, played mostly in evasion of what are supposed to be the rules. That point of view is unjust to an enterprise which, when one considers the magnitude of its tasks, has maintained a high level of efficiency.

A few recognized principles of political science.

There are certain principles of government upon which virtually all students of the subject are agreed,—enough, perhaps, to form the nucleus of a science. Hardly anyone, for example, now disputes the proposition that if you desire expert skill in any administrative office you should make the office appointive, not elective. Likewise there is general agreement on the principle that administrative responsibility should be centralized, not diffused. Every government should plan its financial operations for each year and embody them in a budget. Judges should have reasonable security of tenure. Taxes should not be levied on anyone without a prior assessment. Many other examples could be given. The science of government develops certain principles and the art of government consists in successfully applying them.

Obstacles to impartial study in this field.

Of course the greatest obstacle to the study of government in a scientific spirit is the extreme difficulty of maintaining an impartial attitude. This results from the content of the subject, from the nature of the questions which arise, and from the ease with which the same data can be differently interpreted. Political issues come very close to human emotions and inherited prejudices. There are few individuals who can calmly, dispassionately, and in a completely neutral spirit undertake an analysis of public ownership, unemployment insurance, old age pensions, collective bargaining, monetary inflation, mortgage relief, Philippine independence, birth control, compulsory arbitration, or naval disarmament. Opinions on such matters are not reached with the intellectual neutrality which a natural scientist displays towards his problems. There is nothing in the human emotions which impels a chemist to favor alkalis as against acids. He bears no inherited prejudice against the proposition that nature abhors a vacuum. He merely sets it down as one of the things that has to be.

The inherent prejudices of the individual.

But every student of American government has been born and brought up in a sectional, social, economic, religious, and political environment, the influences of which cling to him through life. His observations and judgments will be affected by this fact, no matter how honestly he may strive to submerge his inherent sympathies and aversions. Hence it is virtually impossible for any citizen to give a thoroughly unbiased portrayal of the structure and workings of his own government. The best book ever written on the government of the United States is the work of an Englishman; the best book ever written on the government of England is the work of an American.[1] This is significant but not surprising. It points to the advantages of emotional detachment on the part of those who are on the outside.

The atmosphere of bias.

Nor is this difficulty merely one of overcoming partialities that have been inherited. Every citizen lives his whole life in an atmosphere that is surcharged with partisanship. He is deluged with propaganda, adroitly garbed as sound information. He is in daily contact with people who look through colored glasses (rose or blue) upon every act of the public authorities. His eyes are requisitioned daily by the newspapers and his ears by the radio. He is importuned for support by politicians who believe that the science of government originated at the last presidential election and that the art of government is an ironclad monopoly in the hands of one political party. All this befogs the atmosphere of scientific inquiry. It is rather humiliating for any citizen to profess an uncertain opinion on a political issue when everybody else seems to have reached a confident one.

The citizen's readiness to form snap judgments.

It is perhaps worth remarking that the average citizen assumes no such cocksureness of opinion in fields of knowledge other than public affairs. If you ask him, for example, what is meant by polarized light he will refer you to a scientist for the answer. If you ask him whether courts of equity should have power to issue writs of mandamus he will explain that he is not a lawyer. In such things he will exhibit a decent respect for the limitations of his own competence. But turn to the realm of government and ask him whether the national tax system ought to be revised and how; whether the powers of the Supreme Court ought to be curbed; whether industrial codes were a success or a failure; whether the con-

[1] James Bryce, *The American Commonwealth* and A. Lawrence Lowell, *The Government of England*.

tent of the gold dollar should be further reduced or the inheritance tax increased; whether we should have social insurance and who should pay for it—ask the plain citizen any of these questions and he will hardly ever hesitate to give you a definite opinion straight from a closed mind. He will not reply that he has made no study of taxation, jurisprudence, industrial economics, social insurance, or social policy,—which would be the accurate answer in most instances.

Can this propensity be corrected?

There is only one way to correct this situation, which is by the spread of properly organized instruction in the schools and colleges. There the on-coming citizenship can be brought to realize that facts, however awkward, are of controlling importance in government as in everything else; that the same facts may be subjected to differences in interpretation; that there are at least two sides to every political question, and sometimes more than two; that it takes patience and industry to get at the bottom of tough problems; that a scientific neutrality on any issue of political policy or social conduct is extremely hard to maintain; and that problems of government are inherently as difficult as are those of science or engineering. They demand the same concentration of thought. They cannot be understood except by the same process of diligent study. If the problems of government were as simple as most citizens seem to think they are, we should have found solution for them a long time ago.

Knowledge of the facts as the basis of opinion-forming.

Glance through the index of this book, or any other book, on American government. Administration, agriculture, ambassadors, anarchism, appointments, appropriations, assessments, attainder, ballots, banks, bankruptcy, bimetallism, bonds, boroughs, bosses, budgets, cabinets, campaign funds, carpet-baggers, caucuses, censorship, charters, child labor, citizenship, city planning, civil service, coinage, common law, constitutions, contracts, copyrights, credit, courts—and so on for a dozen or more closely packed pages. These words, every one of them, point to policies and problems which are very far from being simple in their implications. Sometimes the idea involved in one of these terms is simple enough, but in the domain of government an idea is sometimes so greatly at variance with the actualities that the one becomes almost the negation of the other. This means that the student of government must not let himself be misled by the ostensible relation of things but should look below the surface and scrutinize them as with a

microscope, for the most important political forces are sometimes the ones with the least visibility.

The study of government as an aid to constructive citizenship.

There is a third reason for the study of government. It is to be found in the relation of citizenship to patriotism. A free government demands obedience from its people, yet there can be no intelligent obedience unless the citizen knows what it is that he obeys. A government requires the coöperation of its people, but there can be no effective coöperation unless it be based upon understanding. A government feels itself entitled to the confidence and respect of the people, but no genuine political confidence can ever be founded on civic ignorance. Good intentions do not suffice to make a good citizen.

When men and women pledge allegiance to the flag, and to the Republic for which it stands, they should at least know what kind of republic it stands for. When they repeat their formula of "one nation, indivisible, with liberty and justice for all," they should at least have some general idea as to how it came to be one nation, why it has remained indivisible, how liberty was achieved, by what means it is preserved, and through what instrumentalities of government the ideal of even-handed justice is sought to be attained. When the citizen, on taking public office, swears to uphold the Constitution of the United States he may reasonably be presumed to have read it; but this oath has been taken by many a man who has not.

The citizen in his sovereign capacity.

The American philosophy of government endows the citizen with ultimate sovereignty. It places in his hands the power to determine what kind of government he shall have. It is for him to say, directly or through his elected representatives, what shall be enacted in the constitutions and laws of the nation and the states, what taxes shall be imposed, what expenditures made, and what policies pursued. This is a vast responsibility. It is a responsibility that cannot properly be met by the citizen unless he has at least a general knowledge of what his government is and what it is supposed to do. Men are not usually interested in the things that they know nothing about. The promotion of an intelligent and responsible civic interest, therefore, is the third object in the study of government.

How improvement comes.

The constitution and the government of the United States are entitled to respect. The more study one gives to them, the greater is that respect likely to be. Not only is it likely to be greater but

it will rest on a surer foundation. This is not to suggest, however, that there are no flaws in the nation's fundamental law or in its frame of government. There are plenty in both. And government, whether in the nation, the states, or the local areas, can only be improved by changing it. What man does not transform for the better, time will alter for the worse. A constructive citizen, accordingly, is one who knows enough about his government to discern its weak spots and who deems it his obligation to help strengthen them, to the end that his government may more fully command the obedience and respect of the people. It is only by increasing the number of such men and women that either the constitution or the government of the United States can be made to endure.

Methods of study: 1. The proper approach.

Now a word as to the methods of study. In approaching this subject one of the first essentials is to get rid of the notion that the government of the American people is a simple affair, easy to understand without concentrated effort. It is, in fact, everything but simple. It is the most complicated government on earth, and the most difficult to understand. True enough, one can imbibe a smattering of it without systematic study and every native-born American does so as he goes along. But the information that he gets in this way is fragmentary, often half-accurate, and always tinged with partisanship. In this field, as in so many others, a little knowledge often proves a dangerous thing, for men act upon it without realizing its inadequacy.

A recognition that the subject is a difficult one.

Government as a science is not an easy subject. To become even reasonably conversant with the structure and functions of American government in nation, state, and municipality is an undertaking of larger proportions than most people imagine. To secure a clear picture of the relations which exist between the various organs of government, the limitations under which they work, and the forms of pressure that are put upon them,—let no one imagine that this can be achieved with less intellectual effort than is required to be spent on higher algebra or solid geometry. There is only one way in which the study of government can be made easy for the average man or woman, namely, by omitting or glossing over everything that is difficult. If, therefore, the reader of this book finds the subject easy, he may make up his mind to one of two things—either that he has an uncommon genius for the study of public affairs or that he is missing most of the points.

2. Note-taking.

The study of a government involves not only careful reading but study and reflection as well. It should be done with pen in hand and a notebook on the table. Good note-taking is a fine art. Many young men and women go all the way through college without ever becoming proficient at it. What the student should aim at is not a mere condensation of the reading but a recasting of the principal ideas in his own language, fitted to his own point of view. He should devise, if he can, an arrangement of the material which is clearer and more logical than the one followed in the book. It can often be done and there is nothing more serviceable in the clarification of any subject. Careful and orderly note-taking, moreover, affords opportunity for practice in the art of clear and concise writing, and the mastery of this highly useful art is largely a matter of practice. Hence it is better to write one page of thoughtful notes than to dash off five pages of unpunctuated scrawl that displays neither reflection nor discrimination.

3. The questioning attitude.

The purpose of study is to incite one's mind into self-propelled activity. Education ought to stimulate one's intellectual curiosity. It is not of enduring value unless it does. The study of government. in particular, should develop this habit of self-questioning. Many political institutions and practices continue to exist for the mere reason that they have become traditional. They suggest a challenging of their merits. One man's opinion on most political questions is about as good as another's, provided, however, that both opinions are based on equal thoroughness of study. On the other hand no man has a moral right to hold an opinion without a reason for it, a reason that is valid to his own mind. But if he has such a reason his own opinion is more useful, in the educational process, than a ready-made one borrowed from somebody's book.

4. The avoidance of undue iconoclasm.

Hence it is better to maintain a scrutinizing attitude in the study of government than to be content with the memorizing of facts and the unquestioning acceptance of traditional principles. On the other hand there is no particular virtue in being a congenital iconoclast. What is, for the most part, is right. If it were not so it would not be. For the law of natural selection is at work among governmental institutions and methods. It eliminates the unfit, although rather slowly at times. Hence the benefit of the doubt, when one is in doubt, should be given to what we have rather than to something that might with some possible advantage be put in its place. This is not to argue against the practice of trying

experiments in government but only to suggest that they be not tried unless there are reasonable prospects of success, for when experiments fail there is a weakening of the people's confidence in their government. Then they call for a general reconstruction, with results that are sometimes disastrous. Dictatorships have on more than one occasion grown out of unwise and unsuccessful experimentation by democracies, especially in the domain of economic affairs.

The greatest of all the sciences.

Government, as Emerson once said, is "the greatest science and service of mankind." The world is giving more thought to it nowadays than ever before. And rightly so, for never have the foundations of democratic government been so violently assailed. Man's rulership over nature has become more successful year by year; but man's rulership over man is making no such advance. The human race has been far more successful in controlling the relations between man and his environment than in establishing satisfactory relations between man and his fellow men. Surely there is need for thought in a situation where human progress is moving forward in all the sciences except the one that ought to be the most important.

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CHAPTER II

THE BACKGROUND AND BEGINNINGS OF AMERICAN GOVERNMENT

It is not the least debt that we owe unto history that it hath made us acquainted with our dead ancestors; and out of the depth and darkness of the earth delivered us their memory and fame.—*Sir Walter Raleigh.*

Governments that have influenced the world.

It goes without saying that the government of a country is of special interest to the people who live under it. Whether it will be of interest to anybody else depends upon the extent of its influence on the moulding of other governments, outside its own borders. Now there are three governments which have been exerting such an influence during the past hundred years, and the government of the United States is one of them. The governments of England and of France are the others. The theory and practice of English parliamentary government have had a profound influence upon the development of national institutions throughout the world. France, in the field of local government, has had an influence almost as great. And the United States has been the world's foremost example of federalism. All federal governments established during the past hundred years have been indebted to the United States. This is particularly true of the federal governments within the British Commonwealth of Nations, such as Canada and Australia.

Why American government deserves special study.

The government of the United States deserves special study for a number of reasons. For one thing it controls the destinies of nearly one hundred and thirty million people. It represents the oldest, the most elaborate, and the most successful effort to combine central authority with local self-government. It is true, of course, that there were federal governments long before the Constitution of the United States was framed,—the Achaean League in ancient Greece, for example. But until the rise of the American Republic there was a world-wide belief that the federal form of government was suitable for small states only, and that it was inevitably a weak form of government because it parcelled

power into too many hands. Hence the general conviction that no federalism on a large scale could long endure.[1]

A conspicuous experiment in federal democracy.

But the United States, during the nineteenth century, proved the fallacy of this conviction. America demonstrated to the world that federalism did not necessarily mean weak government, but that it was quite reconcilable with a strong national administration. American federalism survived the strain and stress of the Civil War, spread from the thirteen states to forty-eight, and proved itself amenable to both the spirit and practice of democracy. American governmental experience has proved to the world that a republican system, organized on a federal basis, can satisfactorily serve the political needs of a vast population scattered over a whole half-continent. It has demonstrated the potential strength of a federal republic both in foreign and domestic policy.

A system that has developed by the process of trial, error, and correction.

For more than a hundred years, moreover, the United States has been serving as a great laboratory of political experimentation. In the nation, in the several states, and in the thousands of local areas almost every conceivable experiment in the art of ruling people has been given a trial. By this process of experimentation we have developed some of the best, and some of the worst, governmental practices that have been evolved anywhere. At any rate Americans have a vast amount of home-grown data to go upon. The study of American government, accordingly, is not the study of something that was planned and created in accordance with an accepted political philosophy but of a continually changing organism which has come to be what it is by the unending process of trial, error, and correction. That is what gives it interest. Incidentally, no one can understand the American system of government without delving into the past, for it is a child with a heritage.

The American Revolution a climax, not a starting-point.

It has sometimes been said that the most notable achievement of the American people has been the welding of a half-continent into a unified nation. And for this accomplishment the main credit has usually been given to the group of men who sweltered

[1] This belief, indeed, was so firmly rooted that it continued long after the United States had shown ability to maintain a strong and stable government. When the North and the South drifted into the Civil War there was a chorus of "I told you so" from European political philosophers. The English historian, Edward Freeman, published in 1863 a *History of Federal Government from the Foundation of the Achaean League to the Disruption of the United States*. It was generally assumed throughout Europe that the Civil War was merely the outcome of federalism running true to form.

through the summer of 1787 at Philadelphia to produce the Constitution of the United States. But national unity, with all that it implied, was not created out of hand. One must not forget that the thirteen separate colonies which were unified into a single nation had already been brought by more than one hundred and fifty years of historical development into a close political kinship. They had been travelling along the inevitable road to union. Hence the American Revolution was merely the culmination of a growing colonial solidarity, and the constitution was the logical outcome of conditions which the Revolution brought into being.

It did not break continuity.

In one sense the American Revolution was not a revolution at all. It was not a cataclysm like the French Revolution of the eighteenth century, or the Russian Revolution in the twentieth; it did not sweep away fundamental institutions, or transform political ideals, or shift the weight of political power from one class among the people to another. It merely changed the resting-place of sovereignty. The sovereign power had hitherto been vested in the British crown and had been exercised by the grant of charters or through instructions sent by the home authorities to the colonial governors. Henceforth it was to rest in the people of the thirteen commonwealths, to be exercised by them through their own constitutions and laws. In the continuity of American political institutions, therefore, the Revolution marks a break of no great violence. But it guided political evolution into new channels, and set the political ideas of the New World more clearly before its people.[1]

History has few sharp breaks in it.

It is natural that writers who deal with anything that calls itself a revolution should be tempted to exaggerate the revolutionary aspects. And for the most part historians have made too sharp a separation between two great periods of American history, with the Revolution as the dividing line. They have written as though the political institutions of the one period owed nothing, or at any rate very little to those of the other. But American history, during more than three centuries, has very few sharp breaks in it. The law of continuity runs through it like the reinforcing rods of a concrete wall.[2] The American Revolution retained far more than it swept away. There are very few political

[1] A full account may be found in J. F. Jameson, *The American Revolution Considered as a Social Movement* (Princeton, 1926).

[2] See the discussion in E. P. Cheyney, *Law in History* (New York, 1927), especially pp. 12–15.

institutions whose birth date can be definitely set down as A. D. 1776. American democracy did not begin with the Declaration of Independence.

Where American political development begins.

To find the true foundations of the American political system one must look beyond the constitution, beyond the Declaration of 1776, or even beyond the coming of the Mayflower to Plymouth. The principles of civil liberty on which American government traditionally rests, had their birth on the soil of the Old World. Their beginnings go back to the days of the Saxon folk-mote and the Curia Regis of Norman England. The rights of free citizens, as established by Magna Carta, the Bill of Rights, the Habeas Corpus Act, and by the whole fabric of the common law in England, were the patrimony of the American colonists from the outset. They fetched these privileges across the Atlantic with them, just as they brought the English language. The right to a share in the making of laws, the right of self-taxation, the right to trial by jury, the right of petition, the right of assembly, the right of all men to be dealt with equally before the law—these rights did not originate in America. They are the inheritance of the whole English-speaking race. The American Revolution preserved them at a time when they were in danger of being trodden underfoot and the American constitutions, both state and national, proclaimed them anew in clarion tones.

Trading companies and colonial charters.

Observe the landmarks which stand out in the course of this progress, all the way from the earliest migrations to the attainment of national unity. The thirteen colonies which formed the nucleus of the United States were themselves the outgrowth of small settlements planted along the Atlantic seaboard during the course of the seventeenth century. When the first settlers came, it was not with the idea of founding new states; so they were organized as trading companies, with company charters. Soon, however, the colonists found that something more than this was necessary. Hence the company charters gave way in some cases to colony charters or embryo constitutions; in other cases the people went ahead without formal authority, establishing their own local and general governments.

But the lines of this political development were not everywhere parallel. Naturally so, because in point of time there was a wide spread between the founding of the first colony (Virginia) in 1607 and the last one (Georgia) in 1732. Much had happened in the

mother country during this interval. The arrangements under which the different colonies were founded also varied considerably—Maryland and Pennsylvania, for example, were established by individuals, not by trading companies. Differences in the occupations of the people also led to departures from uniformity in the systems of government which were set up by these various communities.

Colonial diversity and kinship.

On the surface, accordingly, there was a great deal of variety in the government of the American colonies. Some had charters, some did not. In some the basic area of local government was the county, in others the town. These political differences were not, however, of great importance. In their political ideals and institutions all the colonies were fundamentally alike; the differences among them are of slight account when weighed in the balance with the broad and deep resemblances. For all these colonies had been founded by Englishmen or had passed under English control. The bond of kinship encircled them all. They possessed, moreover, a geographical unity in that they occupied a virtually unbroken strip of territory extending from Georgia to the Maine district of Massachusetts and from the Appalachians to the sea. The population everywhere was overwhelmingly of one general religious faith and nearly all claimed the English language as their mother tongue. The common law of England formed the basis of the legal system everywhere. Finally, they adhered to a common political philosophy. Their general conception of sound rulership was the system of representation which had been developed by their forefathers in England. Thus there was substantial unity in language, in law, and in political conceptions,—and these in all ages have been the great magnets to draw neighboring communities together.

Royal versus parliamentary power as the basis of colonial government.

The basis of colonial government in each colony was the supremacy of the crown. Explorers and traders went out under royal auspices; they took possession of new lands in the name of the crown, and the territories which they gained became royal property. This was because the English constitution made no provision, in those days, for the parliamentary acquisition and government of territories outside the realm. It gave parliament no jurisdiction beyond the confines of the British Isles. So the first company charters were obtained from the crown which also gave colonial charters to replace these earlier grants.

As a matter of constitutional theory, therefore, the crown was supreme in the colonies even though limited by the growing control of parliament at home. The English parliament granted no colonial charters, appointed no governors, and rarely passed laws that extended to the colonies. It seldom interfered with the process of colonial administration and whenever it did there were vigorous protests from America that it was exceeding its powers.

How the colonists viewed it.

"America is not part of the dominions of England," argued Benjamin Franklin, "but part of the king's dominions." "All members of the British Empire are distinct states, independent of each other but under the same sovereign," wrote James Wilson. This point of view was accepted by virtually all the colonial leaders. The colonies, they held, were coördinate members with each other and with England in a political aggregation with a single executive (the king) but not with a single legislature (parliament). They were willing to give allegiance to the crown but unwilling to give local jurisdiction to a parliament across the seas. Accordingly, the colonists took the oath of allegiance but resisted the acts of parliament. There was no inconsistency in their so doing. Exactly the same attitude is assumed by the British dominions such as Canada and Australia today. The Statute of Westminster, passed by the British parliament a few years ago, formally conceded the soundness of their position.

How the crown exerted its control.

The English crown, of course, did not exercise its powers directly. It controlled the colonies through various administrative agencies. Broadly speaking it left to the Board of Trade [1] all matters relating to colonial commerce, and during the eighteenth century the general supervision of colonial government as well. But the crown could take any matter directly into its own hands and sometimes did so. In any event all instructions went to the governors in the name of the crown, which could also disallow laws passed by a colonial legislature. This power of royal disallowance was frequently used but the colonial assemblies could evade it. Their favorite method was to pass a law for a limited time.

[1] Its full title was the "Board of Commissioners for Trade and Plantations." It was organized in 1696 and originally had eight members. The commissioners were commonly called the Lords of Trade although most of them were commoners. A general statement of the Board's functions may be found in Edward Channing, *History of the United States*, Vol. II, pp. 231–235. The relations between the colonies and the home authorities are described in George L. Beer, *Origins of the British Colonial System, 1578–1660* (New York, 1922) and his *British Colonial Policy, 1754–1765* (New York, 1922).

Structure of colonial government—the governor.

Let us take a brief survey of the American political system as it existed before 1776. Each of the thirteen colonies had a governor as its chief executive. In the eight royal provinces this official was appointed by the crown; in the others he was either elected by the people (in the two charter colonies) or named by the proprietor (in the three proprietary colonies). The position of the colonial governor was something like that of the king at home; he summoned the colonial assembly and could dissolve it when he chose. In some respects his authority was wider than that of the crown, for he had the right to veto the assembly's acts, whereas in England the crown had virtually lost this power in relation to acts of parliament. The appointing authority of the colonial governor was also extensive, and he was the head of the militia in each of the colonies.

Difficulties of his position.

Historians have been rather hard on these colonial governors. It is true that they were not, for the most part, men of conspicuous ability or tact, but on the other hand the office which they held was one which no man could hope to fill acceptably. It carried a dual responsibility. On the one hand the governor was the overseas representative of the crown, the custodian of imperial interests. In this capacity he was expected to carry out orders and instructions issued from London by kings and ministers who knew little or nothing about colonial conditions. On the other hand, he was head of the local administration, responsible for the management of colonial affairs yet dependent upon the colonial legislature for money and support. Thus the colonial governor had to serve two masters, one who gave him his orders and the other who gave him his pay. And there is good authority for the saying that "no man can serve two masters," at any rate he cannot serve two masters and hope that both will be equally pleased with his work.

His general powers and the limitations upon them.

It would be inappropriate to set down in these pages a list of the principal powers exercised by the colonial governor were it not for the fact that many of them have continued to be vested in the chief executive of the states and the nation. The governor summoned the colonial legislature and could veto laws passed by it. He could also dissolve it at will,—a power which no state governor possesses. Likewise he enforced the laws, made various appointments, and was responsible for the colonial defense. He represented his colony in its relations with the home government and with other colonies. He had the power of pardon. But in the

exercise of all these powers he was restrained by the assembly's control of the colonial treasury. There was little that any governor could do without funds and he had no way of getting money unless the assembly voted it. He could not draw his own salary, in fact, until the representatives of the people had authorized it. All in all, the colonial governor occupied an anomalous position, one that no official should ever have been expected to fill satisfactorily.

The colonial legislatures.

In each colony there was also a legislature, usually composed of two branches. The lower chamber, or assembly, was elected by the people, but each colony had its own qualifications for voting, the ownership of real or personal property being nearly always required, with religious tests sometimes imposed as well.[1] On the whole, however, the suffrage was more democratic than in England. The difficulties of travel in the colonies were so great, however, that only a small fraction of those who were entitled to vote usually took part in the elections. The proportion was higher in New England where members of the legislature were elected by towns than in the middle and southern colonies where they were chosen by counties.

The upper chamber in these legislatures

In all the colonies except three the legislature also had an upper chamber. These upper chambers were primarily executive bodies, and in most cases the members were named either by the crown on the recommendation of the royal governor, or by the proprietor. In addition to being the upper house of the colonial legislature, this body served as the governor's council, advising him and sometimes controlling his appointments. Its principal functions, in fact, were executive and judicial rather than legislative. Here originated, by the way, our present-day practice of giving executive duties to the upper chamber of the state legislature—for example, the power to confirm the governor's appointments.

The legislature's authority.

In general the colonial legislatures controlled the purse strings and claimed the sole right to legislate on any matter which concerned the colony's internal affairs. They did not deny the governor's right of veto but they objected to having their colonial laws disallowed by the authorities in London.[2] The colonial legis-

[1] For a full survey see A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies* (Philadelphia, 1905), and Kirk H. Porter, *History of Suffrage in the United States* (Chicago, 1918).

[2] E. B. Russell, *The Review of American Colonial Legislation by the King in Council* (New York, 1915).

latures had full power over the levying of taxes and this was the chief source of their influence upon the executive policy. Holding the purse strings they held the ultimate source of authority. Moreover, it is a general principle of government, verified by world-wide experience, that when you set up an elective chamber its powers are bound to grow, no matter what charters or constitutions may say. That is the course which political progress took in colonial America. The powers of the colonial legislatures were growing steadily when the eve of the Revolution approached.

Law and the colonial courts.

In all the colonies the groundwork of jurisprudence was the common law of England. It was not established in the colonies by any definite enactment, but like other Anglo-Saxon institutions it migrated with the flag. As for the judicial organization some differences existed among the several colonies, but here again the general lines were uniform. All of the colonies had local courts, intermediate courts, and a highest court which in some cases consisted of the governor and his council but which in others was a separate body made up of regularly appointed judges. From these highest colonial courts appeals might be carried to England where they were decided by the Privy Council. The Privy Council was not a court in the ordinary sense; its right to confirm or reject the judgments of the colonial courts was merely one phase of its authority to advise the king, who in turn was the final arbiter in all matters affecting the colonies. Appeals to the Privy Council were not frequent until after 1750 when they steadily became more common. All the colonial courts followed English judicial procedure; the right of trial by jury and the other privileges which Blackstone calls "the liberties of Englishmen" were everywhere given recognition. The colonists thus became schooled by actual experience in the doctrine that men had "unalienable rights."

Local government: 1. In New England.

It was in the field of local government that the greatest diversity of governmental practices appeared. In the New England colonies the unit of local administration was the town, with its town meeting of citizens and its elective local officers. The town raised its own taxes and spent them, made its own by-laws, elected its own local officers, and sent its representative each year to the colonial legislature. It was a miniature republic, rarely interfered with from above. This was practicable because the New England colonists for the most part lived close together, on relatively small farms

The southern colonies, on the other hand, established the county as their chief unit of local administration. They used this larger unit because the plantation system of agriculture caused the population to be more widely scattered. County officers, such as the sheriff and the coroner, were appointed by the governor, and there was no general meeting of the inhabitants to vote the taxes or to determine matters of local policy. As in the English counties of the day much of the work was performed by "justices of the peace," who, despite their name, were administrative as well as judicial officers. They, also, were appointed by the governor.

2. In the southern colonies.

Finally, in the middle colonies, particularly in New York and Pennsylvania, there was a mixed type of local government, a combination of the town and county systems, which bridged the gap between the extremes of New England and the South. Yet the differences in the frame of local government throughout the thirteen colonies were not greater than those which one can find among the several states today. They did not impair the political solidarity of the people. Everywhere the conditions favored democracy. A new country, remote from the social traditions of the Old World, a hardy population engaged in the gruelling task of hewing homes out of a wilderness,—the stage was all set for an era in which liberty, democracy, and union were to be achieved.

3. In the middle colonies.

With such a general approach to uniformity in race, religion, language, and law, with such marked similarities in political organization and temperament, with common problems arising from the pressure of outside enemies, one might suppose that the various colonies would have drawn more closely together and that even before the Revolution they would have devised some form of federal union. It is true that there were some steps in this direction. As early as 1643 the four New England settlements of Plymouth, Massachusetts Bay, Connecticut, and New Haven united in a league of friendship, particularly for mutual support against Indian attacks and arranged that each should send two delegates to a joint conference every year. But the existence of this league came to an end after the Indian dangers, against which it had been organized, had passed away. From time to time during the next hundred years other leagues and unions were proposed. William Penn made such a suggestion in 1696, with a scheme of union under a royal commissioner and a congress of two deputies from

Early attempts to unite the thirteen colonies:

1. The New England Confederation (1643).

2. Penn's proposal (1696).

each colony.[1] But the clash of diverse interests always proved a stumbling-block, and it required a serious common danger to impress on all the colonies their essential unity and their need of coöperation.

3. Benjamin Franklin and the Albany Plan (1754).

Finally a proposal came from England. At the suggestion of the Lords of Trade a congress was called at Albany in 1754 to form a confederation for mutual defense, and especially to devise a plan for keeping the Iroquois Indians from joining with the French in Canada. At this gathering Benjamin Franklin brought forward a plan of union which the congress, after making some changes, adopted unanimously. Franklin's plan, commonly known as the Albany Plan of Union, contemplated a conference or congress made up of one delegate from each colony, this conference to determine the means of common defense, the number of troops to be supplied by each colony, and the amount of money to be contributed by each. The crown was to appoint a president-general, who should command the united forces and have the spending of the money so raised.[2] But Franklin was ahead of his time, and although the delegates at Albany approved his project, it was rejected by the colonial legislatures when it came before them for approval. Thus the Albany Plan came to naught, but it nevertheless rendered some service in paving the way for the first Continental Congress of the Revolutionary War.

Why union was so long delayed.

Why was it, in view of the manifest advantages of coöperation, that the thirteen colonies did not come into some sort of working federation long before the actual outbreak of troubles with England? Local jealousies afford one reason. A failure to realize that, in a broad sense, all their interests were alike, is another. The home government, moreover, was never favorable to any scheme of union such as would give the colonies a permanent solidarity of action in all matters. It was ready to have them join for the common defense, provided the carrying out of such plan was entrusted to officers sent out from England. In a word, the colonies never realized their essential unity until the acute controversy with the mother country made it clear to them.

The significant thing, after all, is this: In the colonies there was a public opinion and on certain fundamental issues it was

[1] William Penn's "Plan for a Union of the Colonies," February 8, 1696–1697, in the *Pennsylvania Magazine of History and Biography*, Vol. XI, p. 496 (1887).

[2] The plan may be found in the *Writings of Benjamin Franklin* (ed. A. H. Smyth, 10 vols., New York, 1907), Vol. III, p. 212.

fairly well unified. The colonial assemblies were good reflectors of this public sentiment. They judged the colonial temper with remarkable accuracy. If parliament had done it as well there might have been no Revolution. Intercolonial jealousies and differences of opinion related to minor questions. English statesmen assumed that because the colonies could not unite to deal with relatively small issues they would fail to unify on larger ones. In this they proved to be mistaken. When united action became imperative the machinery for it was speedily devised.

Significance of the difference.

This is not the place to narrate the events which led to the breach with England. It should be pointed out, however, that there was no general dissatisfaction with the *type* of government which existed in the various colonies. The Revolution did not come because the colonies wanted new charters or elective governors or manhood suffrage. Its underlying causes were economic; they concerned questions of trade and taxation. But once the spirit of resistance was aroused it found new and broader grievances. The colonists soon came to a realization of the fact that democracy had been forging ahead more rapidly in the New World than at home, and in the Declaration of Independence various new ideals of democracy, unknown at this period in England, found vigorous expression.

Causes of the Revolution.

It was the events of 1773–1774, including the imposition of the new taxes and the action of parliament in suspending the charter of Massachusetts that brought home to the colonies the urgent need for a united front. One of their number was in danger of having its liberties taken away: what of the other colonies, each in its turn? The danger was no longer confined to north or south; it was common to all. Hence the calling of the first Continental Congress, which met at Philadelphia in the autumn of 1774 with delegates present from all the colonies except Georgia. The object of this congress was to take common counsel on what seemed to be a common peril. Its members adopted various addresses to the home authorities, pledged the coöperation of the various colonies in resistance to oppressive demands, and agreed that a similar congress should meet the following year.

The ultimate breach.

First Continental Congress (1774).

But events moved rapidly. Before the early summer of 1775, when this second Continental Congress assembled, the situation had gone from bad to worse. The open clash of arms had come at Lexington and the fate of Massachusetts seemed to be sealed

Second Continental Congress (1775).

The clash of arms.

unless the other colonies could quickly come to her aid. Accordingly the second Continental Congress promptly appointed Washington to the chief command, called upon all the colonies for troops and supplies, and took upon itself the right to issue paper money as a means of helping to finance the armed resistance. These powers were usurped by the congress out of the necessities of the situation; they had no legal or constitutional basis. But they were sanctioned by the acquiescence of the people, and in the last analysis that is the most effective sanction that the actions of any public authority can have.

The Declaration (1776) and the Articles (1777).

All this gave rise to a very anomalous situation. The colonies were still subject to the king although in active resistance to the royal authority. They had assumed the attributes of sovereignty without formally severing their old allegiance. This situation, however, came to an end with the Declaration of Independence in 1776. By this pronouncement the colonies became states, each independent of the crown and politically independent of each other. Such action made it desirable that the Continental Congress should rest on a legal basis with some definition of its powers and duties. Accordingly, on November 15, 1777, the Continental Congress sought to gain permanence and legality for itself by adopting certain "Articles of Confederation and Perpetual Union," which had been prepared by one of its committees. These Articles were then sent to the several states for ratification, but meanwhile the second Continental Congress went ahead with the conduct of the war.

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CHAPTER III

THE EMERGENCE OF AMERICAN NATIONALISM

The origin of the federal government presents no great difficulty to anyone who has carefully studied the constitutional history of the early states and colonies. He finds that the central government of the United States, in its general structure and various branches, is scarcely more than a reproduction on a higher plane of the governments existing in the previous states.—*William C. Morey.*

Nationalism was born of the Revolution.

War, so long as it lasts, is a great solidifier of public sentiment. Internal dissensions are adjourned in war time. In the American Revolution the clash of arms brought all the colonies together and kept them there. The spirit of nationalism, which had been slowly acquiring strength for many years, now emerged into the full light of day. "The distinction between Virginians, Pennsylvanians, New Yorkers and New Englanders is no more," said Patrick Henry, "I am not a Virginian, but an American." Only in part, however, was this eloquent Southerner correct in his appraisal of the new era. Unity of popular feeling lasted as long as the war, and no longer. It continued while the pressure was on. When the danger was passed it began to melt away. Then, in the critical years which followed the close of the war, it had to be re-created.

But Union was not.

One of the purposes of this chapter is to show that the creation of the United States was not the direct and immediate outcome of Saratoga and Yorktown. The federalism which was created by the Continental Congress through the Articles of Confederation could not have endured. Nevertheless, the framing and adoption of these Articles ought to be looked upon as a step of far-reaching importance in the evolution of the American political system as we have it today. It represented, for the first time, a readiness on the part of the whole Atlantic seaboard to enter a union which would be something more than a mere alliance for the common defense, which would be "perpetual" in character and thus endure in peace as well as in war. That, of itself, is enough to designate the adoption of the Articles by the Continental Congress as a noteworthy landmark on the march towards real nationhood.

The date of this action (November 15, 1777) is not a public holiday in the United States, but it has more right to be than some other dates which are honored in that way.

Importance of the Confederation era, 1777–1787.

The Constitution of the United States grew out of the Articles. Without the action of the Continental Congress in 1777 the work of the constitutional convention in 1787 would not have been possible. Gladstone, the "great Commoner" of nineteenth-century English politics once referred to the Constitution of the United States as the greatest document "ever struck off at a given time by the brain and purpose of man." But it was not "struck off at a given time"; it was not in any sense a spontaneous exudation from the brains and purposes of a small group of men. Like all worth-while achievements in statecraft the framing of the constitution in 1787 was a matter of building upon what was already built and finishing what had been already begun.

A failure which led to success.

It is true that the Articles of Confederation were little more than a makeshift and they proved no more satisfactory than makeshifts usually do. Yet they deserve some attention from the serious student of American government because it was the demonstrated weakness of the Articles that helped to make the constitution strong. To gain full value from the reading of history it is not enough to study successes. Failures also carry their lessons. In this instance they taught the American people a great deal. Some of the Articles worked out well and were perpetuated in the new constitution; others worked so badly that they were discarded without regret or hesitation; while still a few others, not having clearly demonstrated their full possibilities for either good or ill, were retained in modified form. The experience of the states under the Articles of Confederation was of immeasurable value in this way, subjecting various political devices, as it did, to the test of actual operation under difficult conditions. The American people probably learned more about the art of government in this decade, 1777–1787, than they did in any other ten years of the eighteenth or nineteenth centuries.

The purpose of the Articles of Confederation.

The title which the Continental Congress gave to the Articles is significant, namely, "Articles of Confederation and Perpetual Union." It discloses the hope and intent that this confederation of the thirteen states would be permanent. Yet the discussions which preceded the adoption of the Articles brought forth the fact that most of the delegates were very skeptical about the

whole enterprise. Some of them felt that the states would never ratify the plan. Others were convinced that the scheme would prove unworkable if they did. Both were wrong, as the outcome proved. All the states ultimately ratified the Articles although some of them took their own time doing it. The last state (Maryland) did not give its adhesion until 1781. And the plan, while absurdly defective, proved to be workable after a fashion. At any rate it carried the states along in a semblance of unity until something better could be found.

Nature of the confederation and its central organ.

By the provisions of the Articles the thirteen states entered into a league of amity; but each state retained its sovereignty, freedom, and independence.[1] Every right not expressly delegated to the confederation was to remain with the states. The organ of the confederation was a congress made up of delegates from all the states, each state sending not fewer than two nor more than seven, but in any case having one vote only. The legal equality of all the states was thus recognized, although there were great differences among them in area and in population.

Powers of the congress under the Articles.

As for political authority, the congress of the new confederation was given very little. It was empowered to manage the war, handle foreign relations, and make peace. In order to continue and finish the war it could call upon the several states for contributions of money or men, but it had no way of compelling them to respond. It was given various internal powers such as those of establishing a postal service and managing Indian affairs. With nine of the states assenting, it could fix the size of the military and naval forces, make treaties, vote a budget, borrow money, coin money, or issue bills of credit, and it did issue paper money in large quantities to pay the expenses of the war.

But it had no power to tax, no power to regulate trade, and no effective authority to settle disputes among the various states themselves. Compared with the vast range of authority which the Constitution of the United States conferred on the new federal government ten years later these powers seem pitiably small, yet they represented substantial concessions on the part of the states. Public opinion was not at the time prepared to go farther. The people were afraid of "strong" governments. They were afraid of a supergovernment. They were afraid of too much government.

[1] For the text of the Articles see William MacDonald, *Select Documents Illustrative of the History of the United States, 1776–1861* (New York, 1897).

The executive.

The Articles of Confederation bestowed little attention upon the executive branch of the government. It was assumed that the congress, while in session, would itself perform all necessary executive functions, but provision was made for a committee of the states to sit and act when the congress was not in session. No mention was made of executive officers, although it was taken for granted that the congress would appoint such as were needed, and it did appoint a superintendent of finance, a postmaster-general, a secretary of war, and a foreign secretary, but these officials were little more than committee chairmen. Nevertheless these appointments foreshadowed the "heads of departments" who later became an integral part of the federal executive under the constitution of 1787.[1]

The lack of coercive power.

Some of the states were so slow in ratifying the Articles that the outcome of the war was virtually decided before the confederation completed its legal formalities. Then, with the disappearance of a common danger, they gradually lost interest in the idea of a common government. So long as the issue of the war hung in the balance the instinct of self-preservation impelled them to give the congress a varying degree of support. But when independence seemed assured they began to send explanations and excuses. Robert Morris, the treasurer of the confederation, complained that importuning some of the states was like preaching to the dead. When he asked permission to levy small duties on imports, one state promptly refused its concurrence, and since unanimous consent was necessary the whole proposal failed. Nothing could be gained by issuing more paper money for the country was already flooded with it. Without money the congress was without power.

The critical era.

By 1783, when the treaty of peace was signed, things were getting into a bad way. There was a confederation; there was a congress; and there were some executive officials. But they were gradually ceasing to function. The war had inflated the currency and prices had gone sky-high. Everybody cried out that the cost of living was excessive, but there was no one with power to reduce it. To visualize what inflation means, and what widespread suffering follows in its train, one need only consult the experience of the United States during the financial panic of 1781–1787. The farmers

What inflation meant in 1781–1787.

[1] See J. B. Sanders, *Evolution of Executive Departments of the Continental Congress, 1774–1789* (Chapel Hill, N. C., 1935).

suffered and blamed the merchants; the merchants went bankrupt and blamed the politicians; the politicians talked claptrap and blamed the propertied classes. Meanwhile the people of each state clamored for tariffs against its neighbors and there was general economic confusion. Radicals began to fish in the troubled waters. With pamphlets and speeches they set themselves to the work of stirring up class against class and state against state. Even at this early date a depression ran true to form.

What the states were doing meanwhile.

But turn for a moment from the demoralized affairs of the confederation and see what the states themselves had been doing during the war and after. As the hostilities spread from one colony to another in the early months of the war, the various royal governors and officials left the country, thus breaking down, in part, the existing governments. Connecticut and Rhode Island merely made a few changes in their colonial charters and kept right on. Virginia, on the other hand, elected a convention which, under Jefferson's leadership, adopted a constitution with a bill of rights and provision for a new frame of state government. One after another the remaining states followed, until Massachusetts, the last of the thirteen, adopted her first state constitution in 1780.

The first state constitutions—their chief provisions.

While these constitutions differed considerably in their detailed arrangements, they all present a marked similarity.[1] In every case provision was made for a governor, to be chosen either by the legislature or by the voters; in nearly every instance a legislature of two chambers was set up; and each state provided itself with a judiciary. Large powers were everywhere allotted to the state legislatures. The principle of "separation of powers," that is, of keeping the executive, legislative, and judicial organs of government separate, gained recognition in only a few of these state constitutions; but in two of them it was stated plainly, namely, in the Virginia constitution of 1776 and in the Massachusetts constitution of 1780.

Bills of rights.

Another characteristic of the earliest state constitutions was the emphasis which most of them placed upon "bills of rights" containing securities for individual liberty. Freedom of speech and of assembly, the right of trial by jury, the privilege of the writ of habeas corpus,—these and many other so-termed unalienable

[1] A conspectus, showing the main features of these several state constitutions, may be found in Edward Channing, *History of the United States*, Vol. III, pp. 459–462. See also W. C. Webster's article on "The State Constitutions of the American Revolution" in *Annals of the American Academy of Political and Social Science*, Vol. IX, pp. 64–104 (May, 1897).

rights were now solemnly set forth in black and white. The state constitutions of this war period, indeed, were strongly tinged with that "natural rights" philosophy which marked the Declaration of Independence. They emphasized the doctrine that men were equally free and independent, that all political power came from the people, and that governments rested upon the consent of the governed.

No break in the continuity.

Yet these new state constitutions did not establish governments that were radically different in form from those which existed in colonial days. Little or nothing was borrowed from outside. The new state constitutions merely represented an overhauling of what had long existed in the several colonies. The office of governor was continued. The legislatures were fashioned after the colonial assemblies but with increased powers. Courts kept functioning as before. The common law remained. Town and county government stood unaltered. There were, however, great changes in the *spirit* of government, in the responsiveness of officials to public opinion and in the attitude of the people towards those in authority.

The revived interest in the study of political fundamentals.

The framing of these state constitutions, moreover, had an important educative influence. While they were in process men turned their thoughts to the fundamentals of government. They read the writings of Locke, Montesquieu, and Tom Paine; they talked of social compacts, checks and balances, popular sovereignty, and the natural rights of the citizen.[1] Hence there were available, in all the states, groups of politically thoughtful men who, when the time arrived, could be called upon to help in the larger work of framing a constitution for the nation as a whole. By 1787 the whole people had become familiar with written constitutions emanating from the people and guaranteeing them against the abuse of power. This was something that as Englishmen they had never learned, for England had no written constitution.

Interstate jealousies develop.

But while people were discussing the doctrines of Locke and Paine the economic situation was getting steadily worse. While they argued about panaceas and utopias the tide of popular discontent kept rising. One cause of the trouble was the scarcity of real money despite the cloudburst of paper notes issued by the confederation and by the states. The various governments were

[1] See the discussion in A. N. Holcombe, *State Government in the United States* (3rd edition, New York, 1931), pp. 23–75.

paying their bills in this depreciated and fluctuating paper. To make both ends meet each state was grasping at everything within reach and out of this avarice a great deal of ill-feeling had developed among them. In some cases the boundaries between the colonies had never been authoritatively fixed; now that the colonies had become states they were coming to blows over disputed claims to this border territory. "There are combustibles in every state," wrote Washington, "which a spark might set fire to."

The war of bantam tariffs.

Likewise there were commercial jealousies. Each state was hurrying to build up its own trade at the expense of its neighbors. Those which had natural advantages tried to exclude others from the use of them. A war of hostile tariffs and trade discriminations began in 1785 when New York imposed fees upon all vessels entering its ports from Connecticut or New Jersey. Virginia and Maryland were at swords' points over the navigation of the Potomac. Great Britain, of course, did not fail to profit by these dissensions. The London government laid toll upon American trade with the British West Indies and delayed handing over the trading posts in the American Northwest, although the treaty of 1783 had promised that these posts would be given up. Trouble was impending all along the line.

Why the congress could not intervene:

Why did not the Congress of the Confederation intervene to prevent this drift to economic anarchy and civil strife? It was still meeting each year at Philadelphia. Doubtless it would have intervened if it had possessed the authority. But the congress

1. It had no money.

had no power of taxation and hence no revenues. It had no money to pay interest on the loans which had been made in France and Holland as well as in America during the war, or even to pay the ordinary expenses of government. The officers and soldiers of the Revolutionary army had in many cases served without pay other than certificates of indebtedness. Now they were clamoring for what the government owed them. These demands of the demobilized soldiers, who wanted their back pay in gold or silver, became highly embarrassing for there was very little gold or silver available to pay anybody. As for the "continental" paper notes they were now ceasing to pass as currency at all, although they were sometimes bought and sold in bundles by speculators at one dollar per thousand. Those who had plenty of this paper clamored for laws compelling creditors to accept it in payment of debts, but in Rhode Island, when the legislature passed an act in com-

pliance with this economic futility, the merchants shut up their shops rather than comply.[1]

2. It had no credit.

By the Articles of Confederation the congress had authority to borrow money (provided nine states assented), and some loans were floated. But with no regular revenues to ensure prompt payment of interest it was not possible to obtain funds on reasonable terms. The national credit of the United States in these critical years was lower than that of Greece, Bulgaria, or Mexico today. John Adams in 1785 was sent to Europe on a borrowing trip, but all he could raise was a relatively small sum at an exorbitant rate of interest. European bankers, in those days, regarded American government bonds as a speculation, not an investment.

3. It had no power to regulate commerce.

Equally vital among the weaknesses of the confederation was its lack of power to regulate trade, either with foreign nations or among the several states or with the Indian tribes of the great hinterland. The regulation of trade involves, as a rule, the making of tariffs. But the Congress of the Confederation could not impose customs duties of any sort. Each state, on the other hand, was making its own liliputian tariff designed to shut out goods from other states. Commercial rivalry among neighboring commonwealths was wrecking the national solidarity that the war had built up, replacing it by local selfishness. Europe looked on and wondered how long it would be before the history of the Italian republics would be repeated in the New World.

4. It was without power to ensure the common defense.

Most ominous of all was the outlook in international relations. England was still entrenched in Canada to the north, while Spain possessed the Southwest. The American colonies had won their independence with the aid of France, but who could tell how long the tottering French monarchy would stay friendly or continue in a position to render aid? Two powerful nations of Europe were on the confederation's flanks: what if they should some day join hands to raid the land and divide the spoils? Such a danger was by no means beyond the range of possibilities if the states should start warring among themselves. Seventy-five years later, when a much larger group of American states engaged in civil strife over the issue of slavery, the danger of foreign intervention, and with it the probable disruption of the Union for all time, was still

[1] This gave rise to the famous case of Trevett *v.* Weeden in which the courts held the "forcing" act to be unconstitutional—one of the earliest (if not the earliest) among decisions of this type. See also *below*, p. 69.

serious. How much more vividly the danger must have appeared to sagacious men in the last decades of the eighteenth century!

The problem of the western territories.

Finally, there was the question of the great western territories. At the close of the Revolution all the land east of the Mississippi was claimed by one or another of the various individual states. These claims, most of them having been based on colonial charters or on treaties with the Indians, were hopelessly in conflict. If each state had undertaken to enforce what it considered its own rights there would have been a general war. So it was proposed that all should hand over their claims to the congress, which would then use the territory for the common benefit, eventually making new states out of it. One by one the several states consented to do this and in 1787, shortly before the Congress of the Confederation went out of existence, it passed the famous Northwest Ordinance providing a frame of government for this ceded territory.[1] Although this was probably the most important piece of legislation enacted by the congress it is significant that only eighteen members, representing eight states, were present to vote on it. How could a central government hope to manage this great western domain firmly and successfully if the individual states were so reluctant to give it support?

The Northwest Ordinance.

Dark and bright spots.

All in all the situation was critical. There was a perceptible weakening in popular respect for government and for the existing social order. People were defaulting on their taxes, refusing to pay their debts, insisting that the government owed them a living, and in some cases calling for a redistribution of private property. The Shays Rebellion in Massachusetts (1786) proved that something akin to chaos in government had spread a long way.[2] On the other hand one must not paint too doleful a picture of those times.[3] There were some bright spots on the horizon. Bad as conditions were, they hardly justified Alexander Hamilton's lament

[1] J. A. Barrett, *Evolution of the Ordinance of 1787* (New York, 1891), and B. A. Hinsdale, *The Old Northwest* (new edition, New York, 1899), give in detail the history of this enactment.

[2] "Their creed is that the property of the United States has been protected from the confiscations of Britain by the exertions of all and therefore ought to be the common property of all. . . . They are determined to annihilate all debts, public and private, and have agrarian laws which are easily effected by means of unfunded paper money which shall be a tender in all cases whatever." From a letter of General Knox to George Washington (1786).

[3] For an interesting summary of the bright spots see Charles A. and Mary R. Beard, *The Rise of American Civilization* (2 vols., New York, 1927), Vol. I, pp. 302–309.

that the country had reached "almost the last stage of national humiliation." "National disorder, poverty, and insignificance," he bemoaned, "form a part of the dark catalogue of our public misfortunes." [1]

Summary.

The shortcomings of the confederation were well summarized in what Washington called "the absence of coercive power." "I do not conceive," he wrote, "that we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the state governments extends over the several states." In other words the Congress of the Confederation was a government of the states, not a government of the people. Specifically it was weak because it lacked four things which every strong national government must possess: the power to tax, to borrow with facilities for repayment, to regulate foreign or interstate commerce, and to maintain its own army for the common defense. It is significant that these were the four greatest powers given to the Congress of the United States by the new constitution which in 1787 replaced the old Articles of Confederation.

Attempts to strengthen the confederation.

During these troublous years there were thoughtful men who realized that the confederation must be strengthened or it would go to pieces. If nothing else, it would go bankrupt. In 1786 matters came to a point where the Congress of the Confederation felt that there was nothing to do but put the whole matter plainly before the nation. "A crisis has arrived," it declared, "when the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether, for the want of a timely exertion in establishing a general revenue and thereby giving strength to the confederation, they will hazard not only the existence of the union but of those great and invaluable privileges for which they have so arduously and so honorably contended."

The Annapolis Convention (1786).

Now it happened that Maryland and Virginia were at this moment endeavoring to reach an agreement on certain matters affecting trade, tariffs, and navigation. Then Pennsylvania and Delaware were asked to join in the negotiations. Seeing the opportunity, James Madison persuaded the legislature of Virginia to invite all the states to a conference at Annapolis so that the

[1] *The Federalist*, No. 15.

whole question of interstate trade relations might be discussed. The response, however, was disappointing, for when the conference met, only five states were represented and it was not deemed worth while to proceed.[1] Before the conference adjourned however, Alexander Hamilton of New York made the suggestion that another attempt be made to get all the states into a convention so that the question of confederation might be considered. Resolutions were accordingly adopted asking all the states to send representatives to such a convention in Philadelphia during the summer of 1787. The Congress of the Confederation was asked to join in this call, which it did.

Its ostensible purpose.

Meanwhile Washington, Hamilton, Madison, Franklin, and others had lent their great personal influence in support of the plan. Nothing was said about framing a new federal constitution. No one dared to propose that the convention be authorized to go so far. The avowed purpose was to revise, supplement, and strengthen the Articles of Confederation. When the call reached the various state legislatures some of them acted promptly; others were suspicious and held off; but in the end all of them except Rhode Island appointed delegates.

How delegates were chosen.

The invitation did not specify how the delegates were to be chosen, but in all cases the appointments were made by the state legislatures or by the governors under authority given by the legislatures. In no case were the delegates to the constitutional convention of 1787 directly elected by the people. Many of them were sent with specific instructions to revise the Articles and do nothing else. The date fixed for the assembling of the delegates at Philadelphia was the second Monday in May, 1787.

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[1] Nine states appointed delegates but only Virginia, New York, New Jersey Pennsylvania, and Delaware were actually represented.

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CHAPTER IV

THE CONSTITUTION AND ITS MAKERS

A federal state requires for its formation two conditions. There must exist, in the first place, a body of countries, colonies or provinces so closely connected by locality, by history, by race, or the like, as to be capable of bearing in the eyes of the inhabitants, the impress of common nationality. . . . A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants. . . . They must desire union, and must not desire unity.—*Albert Venn Dicey.*

When and where did the making of the constitution begin?

In telling the story of the federal constitution it is hard to know where to begin. If you start with the convention of 1787 you will find that the members of that immortal gathering, in almost everything they did, harked back to the constitutions which had been put into operation by the several states. If you begin with these state constitutions you will discover that they cannot be fully understood without going back to the colonial charters. And the colonial charters had their origin and inspiration on the other side of the Atlantic. In the last analysis, therefore, the framing of the American constitution began at Senlac, at Runnymede, at Marston Moor, at Westminster. John Lackland, Simon de Montfort, John Hampden, and Oliver Cromwell, not to speak of John Milton and John Locke—they all had a hand in it. In a sense, indeed, Aristotle was one of the framers, for he first enunciated the principle of separation of powers, which is the most conspicuous feature of the American constitution.

But a chapter on the making of the American federal constitution cannot well cover the history of political theories from Aristotle to Madison. It will be long enough if it explains how the document was framed, who did the work, what manner of men they were, and what difficulties they had to overcome. In truth the work was a great achievement, perhaps the greatest single accomplishment in the whole history of the American people. These Fathers of the Republic, when they finished their task nearly one hundred and fifty years ago, were not especially proud of their handiwork, but they builded better than they knew.

Organization of the convention.

The convention was summoned to meet on the second Monday in May, 1787, but when that date arrived many of the delegates had not reached Philadelphia and more than a fortnight was lost in getting started. At length, a sufficient number being on hand, the convention unanimously chose Washington as its president, decided that votes should be taken by states as in the Congress of the Confederation, ordered that its deliberations be kept secret, and plunged right into its work.[1] The meetings were held in the old brick State House in Philadelphia, the building in which the Declaration of Independence had been signed, and probably in the same room.[2]

Who composed it?

Who were the men here assembled to wrestle with the problem of welding thirteen restless communities into a single nation? Seventy-four delegates were appointed but only fifty-five ever attended, and some of these were present for a few days only. The average daily attendance was between thirty and thirty-five. There is a popular notion that these embodied most of the wisdom and resourcefulness that could be sifted from among the three million people who inhabited the thirteen states. Jefferson once spoke of them as an "assembly of demigods." Others have seconded the motion by calling them the greatest galaxy of patriots ever assembled in one place. In truth, however, the convention of 1787 was not a gathering of supermen but contained ordinary human beings of varying types. Undoubtedly it included a few men of great political sagacity. Washington, Franklin, Madison, and Hamilton would have done honor to any assembly, howsoever high its standards of statesmanship.

All sorts of men.

But the convention also included in its membership some men who possessed neither ability nor a sense of humor, as the proceedings disclose. All that can truly be said of the convention's make-up is that it included men of widely differing abilities, foresight, temperament, and experience. Therein lay its real strength and power. In addition to the great quartette just mentioned the membership of the convention included a number of capable, shrewd, and re-

[1] The convention appointed a secretary, William Jackson, who kept a journal of the proceedings but it turned out to be little more than a skeleton of formal motions and votes. If we had to depend on this journal alone we would know very little of what went on in the convention from day to day. But James Madison, one of the leading delegates, wrote a personal diary of the proceedings, which subsequently proved to be of the highest interest and value. Several editions of Madison's *Debates in the Federal Convention* have been published.

[2] Some of the meetings may have been held in the room upstairs.

sourceful men such as Gouverneur Morris, James Wilson, John Dickinson, and Oliver Ellsworth; some substantial men of affairs such as Robert Morris, Nathaniel Gorham and Thomas Fitzsimons; some adroit politicians such as Elbridge Gerry and Roger Sherman; some well-meaning men of moderate ability, such as Rufus King, William Paterson, Edmund Randolph, Robert Few, John Rutledge, and the two Pinckneys; some cynics and doubters like Lansing and Yates; one or two long-winded debaters of parochial outlook like Luther Martin; and a number of others who did not have a great deal to say but who listened attentively and voted right when important issues arose. The men in this last group were the ones whom William Pierce in a pen-picture of his fellow delegates termed the "respectable characters" of the convention.[1]

The absent notables.

Those who are familiar with the post-Revolutionary epoch of American history will notice that although the foregoing list is an impressive one, it omits the names of several well-known leaders. Thomas Jefferson was not a delegate; he was in France on a diplomatic mission. But Madison kept him informed of what was going on, and in general he approved. Patrick Henry was not a member of the convention; he had an opportunity to be one of the Virginia delegation but declined. Neither was John Hancock nor Samuel Adams of Massachusetts there, nor Tom Paine, the great radical, nor John Marshall, the foremost expounder of the constitution in later days.

Variety of the opinions and interests represented.

The fifty-five delegates came from twelve states, Rhode Island alone being wholly unrepresented: her legislature was controlled by radicals who would have nothing to do with the proceedings. Pennsylvania sent her full quota of seven; while New York sent only three, and these were absent a large part of the time. Nearly half the delegates were college graduates; and a majority had held public offices of one sort or another, some of them posts of high importance.[2] Twenty-eight had sat in the Continental Congress or in the Congress of the Confederation. Almost as many were destined to serve in office under the new constitution. Lawyers

[1] William Pierce of the Georgia delegation diverted some of his time from the serious work of the convention to write and leave for posterity an interesting though somewhat facetious sketch of his colleagues. It is printed in the *American Historical Review*, Vol. III, pp. 310–334.

[2] Nine were graduates of Princeton, four of William and Mary, two of Yale, two of Harvard, two of Pennsylvania, and one of Columbia. Among European universities Oxford, Glasgow, and Edinburgh were represented.

were in the majority.[1] Not a few delegates were men of large wealth or important business interests. Washington was the richest Virginian of his day and one of the wealthiest men in the whole country. Pierce Butler of South Carolina ranked among the most well-to-do citizens of his own commonwealth. Robert Morris of Pennsylvania was a large landowner; his holdings at one time ran into millions of acres. Many other delegates, though not rich, were men of considerable property according to the standards of the day. All but a very few were drawn from the professional and business classes. Roger Sherman of Connecticut, a shoemaker by trade, and William Few of Georgia, the son of a small farmer, were about the only delegates who represented the working classes. It is significant that there was not a single frontiersman or wage-earner among them.

Aristocrats and democrats.

Nevertheless every shade of opinion and political belief was represented, from Alexander Hamilton, who would have created a thoroughly centralized and aristocratic union, to Luther Martin of Maryland, who wanted the old confederation left as it was, weaknesses and all. There were those who wanted democracy, and a larger number who were afraid of it. Its variety of ideas and attitudes, not its omniscience, was the great asset of this convention. Washington feared that the diversity of opinion was so great as to preclude any action at all. Many wiser groups of men at various times in human history have set their minds to the work of lawmaking, but never has there been a body more evenly balanced, or more willing to compromise for the sake of progress.

Rich men and poor men.

The fact that there were many rich men among the framers of the constitution has given a good deal of concern to radical minds. One distinguished student of American government, some years ago, wrote a whole volume to demonstrate that the constitution was drafted and put through by men who owned land, mortgages, depreciated paper money, or government bonds, in other words by men who stood to profit financially by the establishment of a strong, orderly government.[2]

But many of those who signed the Declaration of Independence

[1] Thirty-three, out of the fifty-five delegates who attended the convention, were lawyers. Eight were business men and six were plantation owners. One was a clergyman, one a teacher, one a physician. Three could hardly be called anything but politicians, and the remaining two had no occupation.

[2] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New edition, New York, 1935).

Wealth and the Declaration of 1776.

were also men of wealth. John Hancock, whose flaming signature tops the list, was probably the richest man in Massachusetts. Jefferson was a large owner of land. John Adams, Robert Treat Paine, and Elbridge Gerry were men of property. Several others were in the same class. The Declaration, quite as clearly as the constitution, was the work of moneyed men; but that does not mean that either document was conceived in a spirit of monetary selfishness. The ownership of property was not looked upon as a barrier to public confidence in those days. The leaders in colonial times had been men of substance; the leaders of the Revolution came mainly from the well-to-do. Why should it be made a reproach to Washington that he was rich as well as resourceful, or to Franklin that he was thrifty as well as wise? Was Jefferson any less of a democrat because he owned broad Virginian acres? If men of wealth and influence had been kept out of the convention in 1787 the natural leaders of the people would have been absent.

The leaders: George Washington.

Washington presided throughout the convention's deliberations. His military bearing and reserve gave dignity to the proceedings. As presiding officer he felt debarred from any part in the debates and is only twice on record as formally addressing the convention—on the first day to welcome the delegates and on the last day to close the proceedings. But he rendered great service in quieting the occasional storms of personal animosity, and there is reason to believe that he accomplished much by conferring with individual delegates when the convention was not in session.

Benjamin Franklin.

Benjamin Franklin, who headed the Pennsylvania group, was the most versatile genius of them all (the "first civilized American," one of his biographers calls him), but he was now eighty-one years old, crippled with rheumatism, and his voice would no longer rise above a whisper. Nevertheless his mature judgment and his quiet optimism were steadying factors of great value. His pen did service when his voice failed, and some of the wisest suggestions came from it.

Alexander Hamilton.

In point of political genius, imagination, and eloquence, none of the delegates equalled Alexander Hamilton of New York. He was still a young man, only thirty, well educated, and with intense political convictions. He distrusted popular government and wanted the ship of state well ballasted. Hamilton wanted the preponderance of power to be vested in the central government; he proposed that senators hold office for life and the governors of

states be appointed by the federal authorities. Moreover, he would have made all state laws subject to absolute veto by these governors.[1] Of course his fellow delegates were not prepared to support so drastic a program. Hamilton, moreover, was absent from meetings a great deal, owing to personal business of an urgent nature. But he was rated the most eloquent speaker in the convention, and his colleagues listened appreciatively even when they were determined to vote his proposals down. On one occasion, after his most magnificent effort, he got nobody's vote but his own. As one of his fellow delegates said, "he was praised by everybody and supported by none."

James Madison.

Then there was James Madison of Virginia. He is often called the "Father of the Constitution," and if the attribute of paternity must go to some one man, he is entitled to it. Less brilliant than Hamilton, he was more widely read, less aggressive, and more patient in the advocacy of his views,—a prim little man, still in his middle thirties, but looking prematurely old, and without a shred of personal magnetism. His style of writing was dry and his voice monotonous. But if ever a man proved that the scholar has his place in politics, Madison did it in this convention. The breadth and accuracy of his information, the perfection of his patience, and the quiet compulsion of his arguments—these things contributed to make him a more influential figure at Philadelphia than Edmund Burke or Daniel Webster could have been. Madison was described as "modest, quiet, neat, refined, courteous, conciliatory, and amiable." Along with high intelligence this was a rare combination of qualities.

Sources of his great influence.

A graduate of Princeton, and from early days an industrious student of past politics, Madison knew what had brought about the rise and fall of every federation from the Achaean League to his own day. In preparation for the convention he prepared elaborate "Notes on Ancient and Modern Confederacies," and this manuscript furnished him with ammunition for his part in the debates. When difficult questions arose Madison was on his feet with the data and precedents. Much of what we now know about the proceedings of the convention, moreover, is due to Madison's methodical industry, for day by day he entered in his private journal a

[1] See Hamilton's "Draft of a Constitution for the United States" printed in Max Farrand, *Records of the Federal Convention of 1787* (3 vols.. New Haven, 1911), Vol. III, Appendix F.

résumé of what went on and as a true record this has proved to be invaluable.[1] The constitution as finally drafted was not a mirror of Madison's political ideas, but it included many of the things that he urged. Madison deserved well of his country, and his days were long in the land, for he outlived all the other members of the convention.[2]

James Wilson.

James Wilson of Pennsylvania also deserves a place in the hall of fame, for he ranks next to Madison as the best-informed and most industrious member of the convention. Wilson was a good lawyer, reasoned clearly, and took great delight in smashing down, with sledge-hammer blows, the arguments of his opponents. With Madison he worked shoulder to shoulder at all times, and they made a great team. Together they won many victories and it was sometimes difficult to determine which deserved the major portion of the credit.

Other leaders.

There were others whose prominence in the convention almost gave them rank as leaders. Luther Martin of Maryland was one of these, a great advocate but a partisan one who made speeches of pitiless length. On one occasion he spoke for two whole days, hot days at that. The world must have lost a great oration for not a fragment of it has been preserved except a casual mention in Madison's diary. But there has come down to us the unfriendly comment of a fellow delegate, Oliver Ellsworth, who remarked that Martin had "exhibited without blush a specimen of eternal volubility." John Dickinson and Gouverneur Morris of Pennsylvania, Roger Sherman and Oliver Ellsworth of Connecticut, Rufus King and Elbridge Gerry of Massachusetts, William Paterson of New Jersey, George Mason and Edmund Randolph of Virginia, the two Pinckneys of South Carolina, were all active in the proceedings and contributed to the outcome in varying degrees. It is hard to tell

[1] Here is Madison's account of the way in which the *Journal* was compiled: "I chose a seat in front of the chamber. . . . In this favorable position for hearing all that passed, I noted in terms legible or in abbreviations and marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and the reassembling of the convention I was enabled to write out my daily notes. . . . It happened also that I was not absent a single day, nor more than a casual fraction of an hour in any day, so that I could not have lost a single speech unless a very short one." The original *Journal* is now in the Library of Congress. It was not published until 1840, after Madison's death.

[2] Madison was a warm admirer of his fellow Virginian, Thomas Jefferson, by whom his political views were considerably influenced. President Theodore Roosevelt, in lecturing at Harvard on one occasion, referred to Madison as "a pale copy of Jefferson." This did not seem to me a fair characterization.

just how much influence each exercised, for in the constitutional convention of 1787, as in all deliberative bodies, the men most frequently on their feet are not necessarily the ones whose opinions counted with their colleagues.

A body of young men.

While the convention contained men of all ages, from Dayton of New Jersey, who was only twenty-seven, to Franklin, who was almost eighty-two, one is impressed with the fact that much of the best work was done by the younger members. James Madison, who contributed most to the daily labors, was thirty-six; Alexander Hamilton, who made the greatest single argument of the whole summer, was only thirty; and Gouverneur Morris, who put the finishing touches to the document, was just thirty-five. At least a dozen other members were still below the meridian of forty-five. The constitution, accordingly, reflected the zeal and optimism of relatively young men, chastened by the mature judgment of their older colleagues. The convention was not a gathering of elder statesmen.

But the delegates were men of experience.

On the other hand the convention was strong in men of practical experience. A majority of the delegates had served in the Continental Congress, or the Congress of the Confederation, or had helped to frame the constitutions of their respective states, or had been governors, or members of state legislatures. Very few of them, indeed, were without political experience of one sort or another, while many of them had acquired a great deal of it. This was what kept the convention from chasing rainbows. Its membership combined youthful idealism with a knowledge of practical politics. One balanced the other. There were occasional references to the political theories of Grotius, Locke, and Montesquieu; but there were more frequent allusions to the actual experience of Maryland, Massachusetts, and Virginia. John Dickinson expressed the convention's general attitude when he suggested that "experience must be our guide; reason may mislead us."

The procedure.

In organizing, the convention adopted its own rules. The delegates, as has been said, were pledged to secrecy, and this was a wise move, for if the subsequent bitter disagreements among the members had been known to the people, the constitution would probably never have been ratified by the states. The summer of 1787 was an unusually hot one in Philadelphia but sessions were held almost every week-day from May to September. Plans and proposals were brought in by delegates and referred to committees,

but all the vital questions were threshed out on the floor by the whole convention. Those who glance through Madison's *Journal* will observe that some things were discussed for a while, then laid over, then taken up again, voted upon, reopened, reconsidered, and debated a half-dozen times before a final agreement was reached. The rules of procedure permitted the utmost freedom of debate and reconsideration. Nothing was railroaded through.

Plans, Compromises, and Agreements

Fundamental questions: the nature of the union.

It did not take long to discover that among the delegates there were conflicting opinions as to what the convention ought to do. Some felt that the Articles of Confederation should be used as a basis and that the convention had no authority to do more than supplement or strengthen the Articles. In a sense they were right. It was for this express purpose that the delegates had been appointed. But others were of the opinion that the Articles were so hopelessly inadequate that revising them would be a waste of time. A vote on this question was taken and it carried, six states to one, with New York divided and five states not yet represented.

The Randolph plan.

Madison sided strongly with the majority. Even before the sessions began he and his Virginia colleagues had prepared a new scheme which disregarded the Articles altogether, and this plan was submitted to the convention in its opening days by Edmund Randolph of Virginia. Known as the Randolph plan (although largely Madison's work) it proposed a real federal union, with a central executive, legislature, and judiciary. Further it contemplated that the federal government should have independent taxing powers and should possess authority to make its mandates fall directly upon the individual citizen, not merely upon the states. The federal Congress, under this plan, was to be made up of representatives from the several states in proportion to the number of "free inhabitants" in each, or in proportion to their respective tax contributions. Virginia would have fifteen or sixteen representatives, while Georgia, Delaware, or Rhode Island would each have only two or three. Thus the larger states would control the new federal legislature. The Congress, moreover, was to have a veto on laws passed by the legislatures of the several states. The Congress was to have two chambers, one elected by the people and the other appointed by the elective house from a panel of names submitted by the state legislatures.

The opponents of the Randolph plan were slow in organizing and it was not until the middle of June that William Paterson of New Jersey, on behalf of the small states, brought forward a wholly different scheme.[1] This plan contemplated the continuance of a congress on substantially the same lines as under the Articles of Confederation—a single chamber with each state having one vote but with the addition of an executive chosen by the Congress, and with provision for a federal judiciary. The Paterson plan also provided for a federal revenue by proposing that the Congress be given the power to levy duties and excises, and it authorized the federal government to use force, if necessary, to compel the states to fulfill their obligations. The adoption of this plan would have necessitated no new constitution. A few amendments to the Articles of Confederation would have sufficed.

The Paterson plan.

For weeks the convention, in committee of the whole, debated the merits and shortcomings of each proposal. Representatives of the larger states pointed out the unfairness of giving to the states which would pay most of the taxes no more representation than those which would contribute little. Their opponents retorted that to depart from the old doctrine of equality among the states, big and little, would be the first step towards the ultimate servitude of the smaller commonwealths. There was no more reason, said one delegate, for giving a large state more votes than a small state than there was for giving a big man more votes than a little man.

Could these two plans be reconciled?

The fundamental trouble was that some states were large and some small; while all were sovereign and independent. They had adopted the doctrine of common equality as a makeshift at the outset of the war; now the small states held to it as a vested right. For a time it seemed as though the convention would break up in disorder by reason of its failure to resolve this fundamental disagreement. "The fate of America" (as Gouverneur Morris put it) "was suspended by the strength of a hair." But there were enough practical politicians on hand to find a solution through the channel of compromise.

[1] An alternative plan was also laid before the convention by Charles Pinckney of South Carolina. Just what this plan contemplated we do not know, for there is a good deal of doubt whether the document which has been published as the "Pinckney Plan" (*American Historical Review*, Vol. IX, pp. 741–747, July, 1904) is authentic.

The Connecticut compromise.

This solution is commonly known as the Connecticut compromise, because it was brought forth in its final form by delegates from that state, although it is believed to have sprung from the fertile intellect of Benjamin Franklin.[1] In brief, it provided that the upper House of the proposed federal Congress should be based on the equal representation of the states, while the lower House should represent the several states in proportion to their respective populations, with the additional proviso that all bills for raising revenue should originate in the lower House. Before the delegates from the larger states agreed to this arrangement, however, they made certain that the new federal government would be a real one. The Connecticut compromise, so-called, was not accepted by them until after the convention had decided that the new Congress, unlike the Congress of the Confederation, should exert its powers directly upon the individual citizen through its own laws; likewise that the new central government would have its own executive officials and courts. This agreement, commonly known as the Great Compromise, cleared the air and removed a serious stumbling-block.

Other compromises.

But presently other sources of friction were encountered. Representatives in the lower House of the new Congress were to be apportioned among the several states on a basis of population, but in counting the population of a state were slaves to be included or left out? And should Congress be free to prohibit the importation of slaves, thus depriving the southern states of their labor supply? Having power to regulate commerce, should Congress be permitted to lay a tax on exports? These and various other questions were productive of much wrangling, but in due course all of them were adjusted, usually by some sort of compromise.

Many other problems had to be worked over patiently. The convention, to use Benjamin Franklin's metaphor, spent a great deal of its time sawing boards to make them fit. The constitution is full of sawed-off provisions. Take the congressional term, for example. Some wanted congressmen elected annually; others urged a three-year term. In the end they split the difference and made it two years. So with the qualifications for voting. A few desired to establish manhood suffrage for all white citizens. More

[1] It was introduced by William Samuel Johnson, a Connecticut delegate who otherwise did not take a prominent part in the debates. A scholar of considerable repute, he had received an LL. D. from Oxford, and on the floor of the convention he was always respectfully addressed as "Doctor" Johnson.

of the delegates favored a property qualification for voting. In the end they left the matter to each state to decide for itself. Another compromise is not embodied in any single clause of the constitution but permeates every section of it. This was the compromise between the delegates who desired a strong central government, able to pay off the war bonds, bring the currency back to par, build up the nation's commerce, and give adequate protection to property rights, and, on the other hand, those who wanted assurance that the new government would be limited, democratic, directly responsible to the people, and prohibited from unduly interfering with the states. To satisfy both, the convention equipped the new government with all sorts of checks and balances.

The agreements of the convention.

But all this should not obscure the fact that the constitution embodies a series of unanimous agreements as well as a string of compromises. Historians have paid too little attention to one, too much to the other. Take the most important section of the constitution, the one that sets forth the "eighteen powers of Congress." [1] On at least fifteen of these powers there was no serious disagreement at all. Everyone agreed, for example, that the new government should have power to levy taxes, to borrow money, to regulate foreign commerce, to declare war, to coin money, to control the postal service, to provide for the national defense, and so on. So it was with the limitations which the constitution placed upon Congress, and on the states. When you say that the constitution is a "bundle of compromises" you are right; but it would be equally correct to call it a series of unanimous agreements.

Putting on the final touches.

The convention did much of its work in committee of the whole, —debating, enlarging, amending, and finally adopting a series of twenty-three resolutions most of which grew out of the Randolph plan. These resolutions were then referred to a committee of detail. This committee elaborated the resolutions into articles, thus putting the new constitution into semi-final form. Thereupon the convention went over the whole thing, section by section. Nearly five weeks were spent at this task, the members working five or six hours each day. Every phrase, indeed almost every word, was carefully scrutinized. Early in September this long and tedious work was finished; then a small committee was named to "revise the stile" of the document. Gouverneur Morris, as chairman of this committee, was charged with the work of putting the provi-

[1] Article I, Section 8.

sions into orderly form and clear phraseology. How admirably he performed this task even a rapid reading of the document will disclose. For conciseness and lucidity the Constitution of the United States still stands without a peer among the constitutions of the world.

The Fight for Ratification

Signing the constitution.

On September 17, 1787, the final draft was ready and it was signed by thirty-nine members of the convention. Of the others, a good many were absent; a few refused to sign. The latter included Randolph, Gerry, and Mason, three of the most influential delegates. But there were no hard feelings. The delegates took dinner together at the City Tavern, bade each other good-bye, and started for their homes. The constitution was then sent to the Congress of the Confederation with two recommendations, first, that the document be submitted for ratification to conventions specially elected for the purpose in each state, and, second, that the new government should be set up whenever nine of these conventions had ratified the constitution. The first recommendation was made because it was felt that the constitution would stand a better chance of adoption by special conventions than by the state legislatures. The second was intended to prevent the whole work being nullified by the refusal of two or three states to come in. No one among the delegates had the hardihood to hope that every one of the thirteen states would accept the new constitution.

The next great question: would the states accept it?

There were serious doubts, indeed, whether even nine states would concur. This is not surprising, for the members of the convention were far from being enthusiastic over the product of their summer's labor. Not one of the thirty-nine who signed the constitution regarded the document with full approval. Alexander Hamilton, for example, gave his signature, but in doing so took occasion to remind the convention that no man's opinions were more remote from the new constitution than his own. He was ready to accept it because he felt that the new federal government could not possibly be any worse than the old one. Benjamin Franklin also had misgivings; but after remarking that the experience of fourscore years had taught him to doubt the infallibility of his own judgment, he placed his name at the head of the Pennsylvania delegation. "Thus, I consent, Sir, to this constitution because I expect no better, and because I am not sure that it is

not the best. . . ." A similar spirit of acquiescence, in the face of doubts and fears, was displayed by many of the others. Twelve states were represented among the signatures by one or more delegates.

How the new constitution was received by public opinion.

As the convention had met behind closed doors no inkling of what the delegates were doing reached the people till everything was done. In lieu of actual information from within the brick walls, however, the newspapers circulated all sorts of gossip as to what was under consideration. Many of these rumors were wild, but even the wildest among them found believers. Some honest men in various sections of the land were convinced that a monarchy was being hatched at Philadelphia. When the constitution was finally made public, it contained, of course, many surprises. There were loud protests that the convention had been summoned to revise the Articles of Confederation and had no right to draft a new constitution. Other critics argued that since the Articles of Confederation had been ratified by the state legislatures they could not be supplanted except by unanimous action of the same legislatures. Who gave these delegates at Philadelphia the right to say that their new constitution should go into effect when approved "by conventions" called in nine states out of the thirteen? They had been given no such right; they had merely usurped it.

Some thought that the new constitution made the central government too strong; others that it did not make the central government strong enough.[1] Some protested that it set up an aristocracy of wealth; others that it went too far in the direction of democracy—with its short terms for congressmen and its provision for having the senators chosen by the state legislatures. Some complained that the new government would be too dependent on the states; others feared that it would be too independent of them.

The fault-finders.

From all quarters, again, came the well-founded criticism that the constitution contained no bill of rights, no guarantees for freedom of the press, freedom of speech, religious liberty, and so forth, such as had been incorporated in most of the state consti-

[1] In Paul Leicester Ford's *Pamphlets on the Constitution of the United States* (Brooklyn, 1888) will be found a collection of criticisms issued by various contemporary opponents of the constitution. These are worth reading because they indicate how many flaws, real and imaginary, the opponents of the new constitution were able to pick in it.

tutions. Thomas Jefferson, for example, regarded this omission as the chief defect in the convention's work. Some people grumbled because the constitution gave the new federal government power to issue paper money; others because it took that right away from the states. Some were afraid that the President's power as commander-in-chief would produce a New World Cromwell, and one critic made much of the fact that the power of Congress within the new federal capital, ten miles square, would be absolute and supreme, thus throttling free government at its very source. Clergymen took a fling at the document as sacrilegious because it contained no mention of the Deity and did not even require that officeholders must be Christians. The fault-finders were numerous, and they included many influential leaders.

The struggle for ratification in the various states.

The Congress of the Confederation, after some delay and hesitation, sent copies of the constitution to the legislatures of the several states. These, in turn, called on the people to elect delegates to state conventions. Such conventions in Delaware, Pennsylvania, and New Jersey accepted the new constitution almost at once; Georgia and Connecticut followed within a few weeks. Then serious obstacles began to appear in some of the larger states: Massachusetts, New York, and Virginia,—where the campaign of opposition grew intense. Criticism was let loose in broadsides, pamphlets, cartoons, stump speeches, letters to the newspapers, and even in doggerel poetry. Letters of denunciation filled whole columns, even whole pages of the weekly journals. Constant Reader, Plain Truth, Americus, Sentinel, Taxpayer, and Rusticus laid their barrage across the editorial desks. Never before had America, or any other country, withstood such a charge of the quill-pen brigade.

The personal animus.

Nor was the ink-spattering wholly directed against flaws in the constitution itself. Personal attacks were launched against the leading men of the convention, and even Washington did not escape the flood of invective. He might be a good soldier, they said, but a patrician in his ideas and a tyro in politics. Franklin was termed a doddering octogenarian in his second childhood, while Madison and Hamilton (still in their early thirties) were ridiculed as schoolboy politicians. The pamphleteers and caricaturists tried to make people believe that John Dickinson and Robert Morris were Tories, that James Wilson was pro-British (Caledonian Jimmy, they called him), Roger Sherman a weather-

cock, while the rest of the delegates were conceited nobodies. From Georgia to New Hampshire the states seethed with discussion, hot and heavy.

The danger in New York.

The danger was not merely that fewer than nine states would accept the constitution, but that the refusal of one or two pivotal states might bog the whole plan. There was New York, for example, where popular feeling was running strongly against the constitution. If New York stayed out, the new union could hardly be a success even though all the other states came in. For New York stretched right across the country from the Atlantic to the Lakes. Four states were to the north of her and eight to the south. No union could be solid without New York. The most immediate need, therefore, was for a campaign of counter-propaganda, or a campaign of education, which would focus the attention of the people, both in New York and elsewhere, upon the merits of the constitution itself, not upon the failings of the men who had framed it.

The campaign of education.

Such a campaign was planned by Alexander Hamilton who enlisted the coöperation of James Madison and John Jay. During the winter and spring of 1787–1788 these three wrote a series of letters which were printed, sometimes three or four letters a week, in various New York newspapers. Each letter dealt with some provision of the constitution explaining, defending, and appealing to the patriotism of the people. All bore the common signature "Publius," and although the individual authorship of several letters cannot be definitely determined it is beyond doubt that the majority of them were the work of Hamilton and Madison.

Value of the "Publius" letters.

Although these newspaper expositions of the new constitution were written hurriedly and for campaign purposes, they set a high standard both in substance and in style. Brushing aside all personalities, all appeals to passion, or to sectional prejudice, they went right to the heart of every constitutional question. They were the work of men who knew, better than any others of their time, just what the provisions of the new constitution were intended to mean. Naturally the letters exerted a great influence upon the public mind, and particularly upon the minds of those who came to the state conventions without a clear understanding of what the various provisions of the constitution implied. Had it not been for this vigorous educational campaign, there is every reason to believe that New York would have rejected the constitu-

tion, for in the end that state ratified by the narrow majority of three votes. In Virginia also the constitution had rough sledding, with Patrick Henry leading the opposition. But the influence of Washington, Madison, and John Marshall saved the day. Virginia ratified, eighty-nine to seventy-nine.

The Federalist.

Even before all the letters of Madison, Hamilton, and Jay had appeared in the newspapers they were collected and printed in book form under the title of *The Federalist*. In that shape they have come down to us, and remain today the best contemporary exposition of what the constitution meant to the men who made it. But of course the book is not a trustworthy guide for those who want to know what the various provisions of the American constitution express or imply today. Twenty-one amendments have since been added; the courts have interpreted many clauses in a way which the makers of the constitution could never have foreseen; political parties have arisen; and all sorts of political usages have grown up around the original frame of national government. Time and circumstances have wrought great and far-reaching changes, especially during the past thirty years. The student of American political philosophy will find in *The Federalist* nothing about the new deal or collective bargaining, the interstate commerce commission or the tariff board, dollar devaluation or old age pensions, the presidential primaries or the grandfather clause—nothing about the many incidents of public policy which are topics of discussion today. But as a treatise on the original philosophy of federal government in the United States these letters of 1787–1788 remain unsurpassed.[1]

Other influences responsible for the adoption of the constitution by the states.

While it is impossible to tell with certainty what would have happened had the constitution been submitted for acceptance to the direct vote of the people in the various states, there is every reason to think that it would have been rejected. At the hands of conventions it had a far better chance of ratification because in none of the states save New York were the delegates to these conventions chosen on a basis of manhood suffrage. In all the remaining states there were property or other qualifications for voting, and the propertied classes were, on the whole, favorably disposed towards the constitution. They felt that nothing but a strong central government could stem the drift to anarchy. The

Attitude of the propertied classes.

[1] There are many editions of *The Federalist*, abridged and unabridged. The book can be found in any library.

constitution drew its chief support from the business interests, the professional men (including the clergy), the plantation owners of the South, the merchants and shipowners, the men of education—in a word from that part of the population which lived in the better-settled parts near the seacoast. A line drawn north and south, about fifty miles inland from the seaboard, would have marked off the supporters of the new constitution from its opponents fairly well.

Where the opposition came from.

The opposition came principally from the interior and sparsely settled areas, from the struggling farmers and pioneers who wanted cheap money issued by the states, who looked upon the merchants as profiteers, and who were in no mood to do anything that would benefit the towns.[1] The new constitution was unpopular with the debtor class and exceedingly so among the non-property owners who were still disfranchised in all the states but one. These non-voters contributed a great deal to the storm of protests, but they did not count much in the ratifying conventions.

The relation of the outcome to the times.

At any rate the constitution was not carried into operation on any tidal wave of popular enthusiasm. It was framed and submitted to the states at a time when business conditions were bad and the national outlook unpromising. The country was in a disillusioned, resentful frame of mind. The delegates at Philadelphia were men of political sagacity and their eyes were not closed to what was going on. They knew that the country was in trouble, that it needed peace, order, and economic stability rather than an additional dose of democracy. They tried to devise a plan of federal government which would meet the existing emergency and could be adapted to future needs. Quite naturally, therefore, the constitution was not so strongly infused with ultra-democratic provisions as would have been one framed ten years earlier, by the men who signed the Declaration of Independence, for example. It was not the sort of document that Daniel Shays, Patrick Henry, Tom Paine, or Sam Adams would have drawn.

A democratic achievement, nevertheless.

Despite its checks and balances, its conservative tone, and its emphasis on protection to the rights of property, this constitution was nevertheless a landmark in the progress of democracy. No leading nation of Europe in 1787 had a written constitution of

[1] For further information on this important point see O. G. Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Constitution in 1787–88* (Madison, 1894), and C. A. Beard, *An Economic Interpretation of the Constitution of the United States* (New edition, New York, 1935).

any sort; nor, with the single exception of England, even the forms of popular government. The new American constitution provided a scheme of government which was much more democratic than that which England possessed at the time. It is probable that Thomas Jefferson, had he been given the task, would have framed a more liberal document, and there is no doubt that Alexander Hamilton would have written a more conservative one. James Madison could readily have devised a simpler and more logical scheme of government. But any such constitution would have been rejected by the states. No one man could have devised the compromises which the constitution contains, and without these compromises there would have been no ratification.

The Fathers of the Republic.

At any rate these statesmen created a union that has endured. Their roll of parchment still governs their children's grandchildren, after the lapse of nearly a hundred and fifty years. Their thirteen states have grown to forty-eight; their three million people have increased nearly fiftyfold. Faulty though their work may have been in spots, can there be any greater tribute to its worthiness than that it has served so long? "Leaders of the people by their counsels, wise and eloquent in their instructions, all these were honored in their generations and were the glory of their times. . . . With their seed shall continually remain a good inheritance, and their children are within the covenant. . . . Their glory shall not be blotted out. . . . Their bodies are buried in peace, but their name liveth forevermore." [1]

The constitution finally ratified.

But to return to the final ratification. It will be recalled that the constitution was to go into force whenever nine states should have accepted it. By midsummer of 1788 the necessary nine had been secured; Virginia and New York soon made it eleven, and the victory became decisive. North Carolina did not give assent till the autumn of 1789, however, and Rhode Island delayed ratification until the spring of 1790.

The new federal government installed.

When nine states had announced their adhesion the Congress of the Confederation, which had prolonged its lingering existence during all these turmoils, issued a call to the various states to choose presidential electors, senators, and congressmen; likewise it designated New York as the temporary seat of the new government, and then gracefully bowed itself out of the picture. It could not muster a quorum to pass a motion of final adjournment.

[1] *Ecclesiasticus* (Apocrypha), 44: 4–13.

Ten states responded by choosing presidential electors, who in due course selected Washington as President and John Adams as Vice President of the Union. Likewise, they chose their quota of senators and representatives in the way prescribed. The new government took office on April 30, 1789.

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CHAPTER V

"THE SUPREME LAW OF THE LAND"

This constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.—*The Constitution of the United States; Article VI, Paragraph 2.*

The Constitution of the United States, to use its own words, is "the supreme law of the land." This ancient and noble phrase makes perfectly clear where the constitution stands. Yet the written constitution is a short document, as such things go. It is shorter than the constitution of any other nation and shorter than any of the state constitutions. There are about 4,000 words in it, occupying ten or twelve pages of print, which can be read in half an hour. But let no one make the error of imagining that these ten or twelve pages can be understood by merely reading them. There are many things in this remarkable document which are not visible to the naked eye. Not only that, but these printed words do not by any means include the whole Constitution of the United States. They form only the basis, the starting-point. Pyramided upon this foundation is a superstructure of vastly greater dimensions, made up of federal and state laws, judicial decisions, usages, precedents, and official opinions which fill statute books, law reports, rules of procedure, and administrative decisions to the extent of a million pages or more. The architects of 1787 built only the basement. Their descendants have kept adding walls and windows, wings and gables, pillars and porches to make a rambling structure which is not yet finished. That is what the framers of the original constitution intended. It was not in their minds to work out a complete scheme for the government of their country. No one in the Great Convention expected the work of that body to do more than point a finger in the direction of the rising sun.

The constitution as a document.

The vast superstructure that is pyramided upon it.

In this sense John Marshall, Woodrow Wilson, and Franklin Roosevelt are entitled to be ranked as makers of the American constitution just as truly as James Madison and Benjamin Franklin were. For these jurists and statesmen have from time to time

The builders keep building.

infused its principles with a new spirit.[1] And thousands have helped them in their task, hence the makers of the constitution, in its wider sense, form a great company which no man can number. Even today they are hard at work, never more so, and their task will not be finished till the end of time. The process by which the constitution has been developed, year by year, will be explained in the next chapter of this book; meanwhile it may be well to indicate what its distinctive and fundamental features were at the outset.

1. The constitution embodies the principle of popular sovereignty.

In the first place the constitution gives recognition to the principle of popular sovereignty. It avows itself to be the act of the people. "We, the people of the United States . . . do ordain and establish this constitution." Of course it can be argued, and quite rightly, that the men who framed it were not chosen by the people, nor was their work ratified by a popular vote. But the fact remains that the document asserts itself to be an ordinance of the people and has been accepted as such for nearly five generations. Without the acquiescence of the people it could never have been continued in force during all these years.

2. It divides powers between the nation and the states.

The second outstanding feature of the constitution is this: that it is a grant of powers. It created a new government and endowed that government with definite rights, making it supreme within its own sphere. Yet it left the state governments functioning—and likewise supreme within their own fields of jurisdiction. This idea of dividing supreme powers among two governments was of course not a new one in 1787. The people had grown accustomed to it. In colonial days they had recognized the London authorities as being supreme in some matters, but had claimed for themselves full authority in others. The Articles of Confederation had also divided jurisdiction, giving a few ultimate powers to the congress but retaining most of them for the states. The framers of the American constitution knew that two governments could be supreme, each within its own sphere, for they had seen it done. So they proceeded to give the new federal government certain powers, to be exercised without interference by the states. All other authority they left to the states and any doubt that might have arisen on this point was resolved in advance by the tenth amendment.[2]

Of course there had been dual governments in other countries

[1] See the author's *Makers of the Unwritten Constitution* (New York, 1930).

[2] "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

long before 1787, but their history had been one long chronicle of failures, partial or complete. Either the central government had received too little power and had perished from general debility, or it had been given too much power and eventually had crushed out everything else. The makers of the American constitution sought to prevent either of these things happening. They wanted a strong central government and strong state governments, with neither encroaching on the other. So they gave large powers to the new federal government, but took care to limit these powers. For example, they tried to assure the new federal government a reasonable revenue, but did not give it unrestricted power to tax; they empowered it to regulate foreign and interstate commerce, but not to interfere with commerce within the states; and they authorized it to maintain an army but left each state its own militia. To the states, moreover, they reserved the whole field of civil and criminal law, the control of local government, the up-building of an educational system and many other far-reaching functions.

How the adjustment of authority was arranged.

It has sometimes been said that the framers of the constitution tried to give all powers of a general nature to the central government, while reserving all powers of a local nature to the states. But that is not what they tried to do. Having in mind the experience of the states under the Articles of Confederation they merely sought to give the new federal government those powers which that experience had demonstrated to be essential. They conformed their work to facts, not to formulas. Look over the Articles of Confederation, therefore, and put your fingers on the weak spots. Note the things that needed to be done, but could not be done because no one had power to do them. You will find that the eighteen powers which were given to the new Congress are directly related to the shortcomings of the somewhat anemic body which preceded it.

A mistaken idea.

Here are the chief powers given by the constitution to the federal government and alongside are placed some of the most important things which, by the silence of the constitution, were left largely or wholly to the jurisdiction of the several states:

The division of powers in detail.

Federal Powers	State Powers
1. Taxation for federal purposes.	1. Taxation for local purposes.
2. Borrowing on the nation's credit.	2. Borrowing on the state's credit.

Federal Powers (*Cont'd*)	State Powers (*Cont'd*)
3. Regulation of foreign and interstate commerce.	3. Regulation of trade within the state.
4. Currency and coinage.	4. Civil and criminal law.
5. Foreign relations and treaties.	5. The "police power."
6. Army and navy.	6. Education.
7. Postal service.	7. Control of local government.
8. Patents and copyrights.	8. Charities and correction.
9. Regulation of weights and measures.	9. Suffrage and elections.
10. Admission of new states.	10. Organization and control of corporations.

The balance has been fairly well preserved.

At the outset the states got much the better of the bargain; but the federal government has grown steadily stronger without reducing the amount of work which the state legislatures have to do. The state governments are much busier today than they were a hundred and fifty years ago. In 1787 the opponents of the constitution predicted that the states would eventually be reduced to the status of mere districts for administrative purposes. They were wrong. Despite all that has happened in the intervening years the original balance of powers has not been radically disturbed. After the constitutional convention had adjourned someone said to Benjamin Franklin, "Well, Doctor, have you given us a republic or a monarchy?" "A republic," replied Franklin, "if you can keep it." The problem of keeping a "republic of republics" did not turn out to be an insuperable one.

3. The principle of separation of powers.

A third outstanding characteristic of the American constitution is its recognition of what has commonly been called the principle of separation of powers, in other words the idea that the three organs of government—legislative, executive, and judicial—should be held distinct and independent, each acting as a check on the others. The executive, according to this principle, should never legislate; on the other hand the legislature should not attempt to administer its own laws. The courts, again, should interpret and enforce the laws but should have no hand in making or administering them.

Derived from Montesquieu.

This interesting doctrine has been customarily associated with a French writer, Baron Montesquieu, whose two volumes on *The Spirit of Laws* appeared in 1748. But the general idea of differentiating the functions of government is as old as Aristotle.[1]

[1] "All states have three elements, . . . first, that which deliberates about public affairs: second, that which is concerned with the magistrates, and determines what

Montesquieu merely gave it a broader and more emphatic expression, and through his writings the leaders of political thought in America were impressed by it. Here is the doctrine in Montesquieu's own words:

Montesquieu's own statement of the doctrine.

"Political liberty is to be found only in moderate governments; even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. . . . In every government there are three sorts of power: the legislative, the executive . . . and the judiciary power. . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive." [1]

Blackstone's endorsement of it.

The great English jurist, Blackstone, was also a strong advocate of governmental bifurcation. "In all tyrannical governments," he wrote in his famous *Commentaries*, . . . "the right of making and of enforcing the laws is vested in one and the same man, or the same body of men; and whenever these two powers are united together there can be no liberty." A majority of the men who framed the constitution were lawyers, and presumably had read his notable volume. His great prestige as an expounder of the common law gave authority to anything that he wrote on principles of government. The most influential members of the constitutional convention of 1787, therefore, accepted this gospel according to Blackstone. "No political truth," wrote Madison, "is of greater intrinsic value. . . . The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Jefferson was equally explicit. "An elective despotism," he wrote, "is not what we fought for, . . . but one in which the powers of government should be so divided and balanced, . . . that no one could transcend the legal limits without being effectively checked and restrained by the others."

they should be, over whom they should exercise authority, and what should be the mode of electing them, and thirdly, that which has judicial power." Aristotle's *Politics* (Jowett's edition, 1885), Vol. I, p. 133.

[1] *The Spirit of Laws*, Book XI, chaps. 4–6, *passim*.

Franklin and the analogy from science.

Benjamin Franklin also favored a scheme of government based upon the principle of counterpoise, but from a different point of view. It fitted the general conception of the universe which he and other men of science held in the closing decades of the eighteenth century. Scientists everywhere, in 1787, accepted the laws of Newtonian physics. They believed the universe to be a thing of checks and balances, with every body in it held to its proper orbit by the gravitational influence of other bodies. Hence it was easy for them to accept the law of gravitation in government—the inevitable pull of large centers of authority upon smaller ones. The way to keep repositories of power within their own orbits was to give them the right dimensions of mass. Government they looked upon as a mechanism, not as an organism. If properly adjusted at the start, it would stay adjusted. "A republic, if you can keep it!"

Colonial experience.

It should be mentioned, moreover, that an additional reason for confidence in the doctrine of separation of powers could be found in the vicissitudes of American colonial history, with which the framers of the constitution were thoroughly familiar. The colonists had repeatedly protested against the interference of the colonial executives in the matters of legislation, and there had been many conflicts over the independence of the colonial judges. Looking back it seemed as though most of the political troubles of the colonial era had arisen from a failure to keep these organs of government separate. Hence, while no express enunciation of the Montesquieu-Blackstone principle was incorporated in the national constitution, the separation therein of legislative, executive, and judicial provisions into three independent articles is evidence that the idea was kept well in mind.

Complete separation of powers neither practicable nor desirable.

In any extreme form, however, the principle of separation of powers would be unworkable. The absolute independence of the three great departments of government would soon bring all governmental activities to a standstill. The framers of the constitution realized this and so made no attempt to secure a complete separation of legislative, executive, and judiciary, each from the others. They gave to the Senate, for example, the right to refuse confirmation of the President's appointments, thereby awarding it a share in the exercise of executive power. On the other hand they gave the President, through his veto, a means of exercising a check on legislation. Then, lest this presidential veto might prove

too powerful a weapon they permitted it to be overridden by a two-thirds vote of both Houses. Again, they assured the judges a life tenure but made them removable by impeachment. They gave the President the power to negotiate treaties, but made a two-thirds vote of the Senate necessary for ratification. Thus they established checks but did not make them too rigid. They separated powers but were careful to establish lines of connection.

The principle has not found approval in European countries.

Strange to say, this principle of separation of powers has not found adoption in the constitution of any country outside the two Americas. No European nation has accepted it. Among the various countries which organized new republican governments after the close of the World War, none made provision that executive, legislative, and judicial power should be kept at arm's length apart. In Germany, Poland, Czechoslovakia, even to some extent in the Irish Free State, the executive was made responsible to the legislature, just as it is in Britain and France. Not in all cases, however, did it remain so. In Germany, for example, the domination of the executive over all other branches of the government presently became complete. So the doctrine of separation of powers, although of European origin, is without much honor there. But in the New World it still retains a host of friends (especially among constitutional lawyers) who look upon it as a cornerstone of democracy. Perhaps they are right in so regarding it, but it is quite within the bounds of possibility that American government would be just as safe, and much more efficient, if the idea could be discarded altogether.

4. The doctrine of judicial supremacy.

The fourth distinguishing feature of the American constitution is its tacit recognition of the principle of judicial supremacy.[1] In every sovereign state there must be a supreme authority whose determinations are final and not subject to be overruled. In England this supremacy rests with parliament, which can do whatever it pleases. No executive veto can be imposed upon the acts of parliament; no British court can declare them null and void. In the French Republic, although there is a written constitution, no court can set aside the mandate of the Senate and the Chamber of Deputies when they act in accord. These countries have accepted the doctrine of legislative supremacy.

[1] For a full discussion of this topic see C. G. Haines, *The American Doctrine of Judicial Supremacy* (2nd edition, Berkeley, Cal., 1932), E. S. Corwin, *The Doctrine of Judicial Review* (Princeton, 1914), and Charles A. Beard, *The Supreme Court and the Constitution* (New York, 1912).

But, in the United States, that is what the framers of the constitution sought to avoid. Experience with repressive acts of the English parliament in the days before the Revolution had impressed upon them the belief that it is the habit of all legislatures to become tyrannical. Hence they set boundaries to the powers of Congress and it was their intent that these limitations should be observed. But how was such observance to be enforced? The statesmen of 1787 did not answer that question.

Did the framers intend to make the Supreme Court the guardian of the constitution?

Yet the issue was bound to arise, for it is impossible to conceive of two governments, working side by side, each supreme within its own field, but without any recognized agency for settling disputes between them. This power to speak the last word, in matters of jurisdiction, could not be given to Congress—the states would not have tolerated it. Nor could it be lodged with the state legislatures, for that would have provided a chaos of interpretations. Was it intended, therefore, to have the Supreme Court serve as the guardian of the constitution, interpreting it and ensuring its supremacy by declaring void any act of Congress that might overstep the allotted bounds of federal power? Was it intended that the Supreme Court should be supreme to the extent of being authorized to declare acts of Congress and acts of the state legislatures unconstitutional?

A hard question to answer.

The constitution itself is silent on that question; it contains no hint that the Supreme Court was or was not intended to be endowed with power to pronounce the last word on questions of constitutionality. Nor do the debates in the constitutional convention throw light on the point. Certain plans were laid before the convention providing for a "council of revision," made up of "the executive" (presumably the President and the Vice President), together with "a convenient number" of federal judges. This council was to scrutinize laws passed by Congress, and any measure to which it objected would be void unless reënacted in Congress by a two-thirds vote. The convention did not like this proposal and chose the simpler method of giving a veto power to the President alone. In the course of the debate something was said about the inadvisability of giving judges power to override the law. "The judges of Aragon," remarked John Dickinson, "began by setting aside laws and ended by making them." But the convention never faced the definite issue of judicial supremacy, never discussed it, and never voted on it.

What the convention would have decided if the problem had come before it in point-blank fashion we have no way of knowing.[1] We do know, however, that the leaders of the convention were familiar with many cases in which colonial laws had been declared void by the Privy Council in England, and they were also aware of the action of state courts in declaring state laws unconstitutional—in the Rhode Island case of Trevett *v.* Weeden, for example.[2] Hence the idea that a court could declare a law unconstitutional was by no means unfamiliar to them. And Alexander Hamilton, in urging the ratification of the constitution by the states, plainly affirmed that the constitution intended the judicial power to serve as an intermediary "between the people and the legislature" in order "to keep the latter within the limits assigned to their authority." [3] It is not unfair to assume, therefore, that if the convention had been strongly averse to the idea of judicial review, it would have gone on record against it.

One sidelight on the matter.

In government, at any rate, it is acts not intentions that count. What the framers of the constitution intended is of less practical consequence than what the Supreme Court has done. The constitution certainly gives this tribunal an opportunity to take upon itself the function of declaring national laws unconstitutional. And the court, under the leadership of Chief Justice John Marshall, seized the opportunity, assumed a position of judicial supremacy, and possesses it today.[4] Moreover, it is hard to see how the constitution could have acquired much binding force if the Supreme Court had acted otherwise. Without some body to enforce its provisions a constitution has nothing but moral force behind it, and the history of new governments everywhere would seem to indicate that constitutional guarantees require something stronger than moral sanction.

The outcome.

[1] Professor Charles A. Beard, after a careful study of all the evidence, is convinced that a majority among the leaders of the convention believed the right and duty of passing upon the constitutionality of laws to be within the authority of the court. See his book on *The Supreme Court and the Constitution* (New York, 1912).

[2] J. B. Thayer, *Cases on Constitutional Law* (2 vols., Cambridge, 1895), Vol. I, pp. 73–78. There is a good discussion of this whole subject in Edward Channing, *History of the United States* (6 vols., New York, 1905–1925), Vol. III, pp. 498–507.

[3] *The Federalist*, No. 78. "The interpretation of the law," said Hamilton, "is the proper and peculiar function of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law."

[4] It first assumed in 1803 (Marbury *v.* Madison, 1 Cranch, 237) the power of declaring laws of Congress unconstitutional; then, in 1810, it took the power of voiding acts of the state legislatures by reason of their repugnance to the federal constitution (Fletcher *v.* Peck, 6 Cranch, 87).

5. The theory of constitutional limitations.

A fifth outstanding feature of the American constitution is found in the number and strictness of the limitations which it contains. It is full of them. There are many things which neither the national nor the state governments may do, such as passing bills of attainder, granting titles of nobility, or taking private property without just compensation. Moreover, the constitution enumerates some things which the national government may do, but which the state governments may not. In the bill of rights it embodies an even longer category of things which Congress must not do, but which the states are at liberty to do if they please.[1] Thus every branch of American government is limited. Whether all the limitations which appear in the Constitution of the United States have really served a useful purpose is a matter to be discussed in another chapter; but in any event they form a significant feature of the document.

6. The conspicuous omissions.

Finally, the Constitution of the United States is distinctive not only for what it contains but for what it omits. Its silence on some points is eloquent. It goes into detail on various inconsequential matters such as the calling of the Yeas and Nays in Congress, the keeping of congressional journals, and the exact wording of the oath which the President must take at his inauguration. Then it omits all reference to many things of far more fundamental importance. There is not a word, for example, about corporations, banks, immigration, education, civil service, political parties, budget-making, agriculture, labor, and the regulation of industry. The constitution indeed contains fewer references to economic and social matters than does the organic law of any other country. Even on political matters it shows some strange lapses.

For example, it provides that the House shall choose its own Speaker, but does not say what his powers shall be. It requires the assent of both Senate and House for the enactment of laws, but says nothing about how a disagreement between these two chambers shall be settled. It makes provision for a president pro tempore of the Senate, but no provision for a secretary of state. It goes into detail about the appointment of federal officials but overlooks the matter of removing them from office except by impeachment. Happily, however, the powers given to Congress are

[1] The limitations contained in the first ten amendments have been held applicable to Congress only, not to the state legislatures unless the state constitutions have copied them, as has been done in some cases.

couched in such broad terms that they have enabled most of the omitted matters to be dealt with by law. Were it not for this flexibility the constitution would have been more frequently amended during the past fifty years and the amendments would have been of wider scope.

Reasons for these omissions.

The silences of the constitution are not altogether to be regretted. Its framers could not forecast the social and economic problems that would arise in the days of their great-grandchildren. They were too practically-minded to concern themselves with any such futility, and they had, in addition, more urgent things to do. For the moment they were trying to pull the country out of a depression, make it prosperous, safe for decent citizens to live in, able to pay its debts, and worthy of respect from the rest of the world. That was a big enough job for fifty-five delegates. As for posterity they provided no fewer than four different ways by which the constitution could be amended whenever occasion might arise. They were at great pains to make certain that, whatever else might happen, neither Congress alone, nor the state legislatures alone, should ever be able to keep the constitution from being changed. It was their thought that changes in the constitution would be made freely, year by year, and that the whole document might be revised from time to time.

Constitution embodied few wholly new principles.

These are the outstanding features of the national constitution. Not one of them was wholly new in 1787. The doctrine of popular sovereignty had been preached by John Locke and Tom Paine. The idea of a constitution as a grant of powers is as old as the Lycian Confederacy, while the principle of separation of powers harks back to Polybius and Aristotle, not to speak of Montesquieu and Blackstone. The doctrine of judicial supremacy and the idea of placing constitutional limitations upon the powers of legislatures were both evolved out of English and American experience in the years before the constitution was drawn. Limitations on governmental authority were as ancient as Magna Carta. Bills of rights were quite familiar to Englishmen. Silences and omissions in a fundamental law were old acquaintances, for the colonial charters and earliest state constitutions had been full of them.

The debt to England.

All this is not surprising. The colonists had brought English institutions to America, set them up over here, modified them, improved them, and made them serve new needs. The men who made the constitution had over one hundred and fifty years of *American*

political experience behind them. Thirteen colonies had tried all sorts of things during that century and a half. Finally, the experience under the Articles of Confederation had been the most enlightening of all. Accordingly, the framers of the constitution, most of whom had served in public office, did not need to go outside the range of their own personal knowledge in order to decide what was worth a further trial. From foreign lands they took almost nothing. The experiences of ancient confederacies, mediaeval republics, and eighteenth-century absolutisms were instructive mainly in showing them what to avoid.

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CHAPTER VI

HOW THE CONSTITUTION HAS GROWN

The American constitution has been worn away in one part, enlarged in another, modified in a third, by the ceaseless action of influences playing upon the people. It has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit.—*Lord Bryce.*

Flexible and rigid constitutions.

It has been customary to classify all constitutions as either flexible or rigid. The Constitution of Great Britain is said to be flexible because it can be changed at any time by parliament. The Constitution of the United States, on the other hand, is classified as rigid, because it cannot be amended by Congress, but requires action by three fourths of the states as well.

The distinction has been overemphasized.

This difference between the British and American constitutions is easy to exaggerate, however, and too much stress has sometimes been placed upon it. If the American constitution could only be changed by adding formal amendments to it, there would be good reason for calling it rigid, but there are other ways equally effective and much simpler. The Constitution of the United States has been enabled to keep pace with the economic and social needs of the country by these other ways rather than by adding amendments to the original document.

The English constitution is not really more flexible than the American.

If we look at the matter in this light, meaning by the American constitution that whole body of rules, interpretations, decisions, and usages which determines the form and facts of actual government, it is not true that the Constitution of the United States is less flexible than that of Great Britain. Take an illustration. Among the great constitutional changes in England during the past hundred years some of the most important are embodied in the various Reform Acts of 1832, 1867, and 1918 which greatly widened the suffrage. But a similar widening of the suffrage has taken place in the United States without any actual amendment of the national constitution, merely through the insertion of new suffrage provisions in the constitutions of the various states.

Take another example, the power of the Supreme Court to

declare laws unconstitutional. The constitution, as has been pointed out, does not give the court this power in express terms. But to say that it is not a part of the American constitution because it does not stand written in that document is like saying that cabinet responsibility is not a feature of the English constitution because no word about it appears in any English statute. Some of the most notable changes in the spirit and practice of American government have taken place without altering a single word in the constitution. It may sound like a paradox, but it is true, that most of the amending has been done without adding amendments.

Another example—the Supreme Court's power.

To illustrate this paradox take the growth in the powers of Congress during the past few years. Without any formal amending of the constitution it has been possible for Congress to assume jurisdiction over the entire banking and credit system of the country, likewise to provide for the guarantee of bank deposits, reduce the gold content of the dollar, give large grants-in-aid to the states, regulate the stock exchanges, and do all manner of things which the constitution does not expressly authorize it to do. These are powers which the constitution gives to Congress by implication, in other words they are derived from the express powers. The phraseology of the original document remains unchanged but it has been stretched to meet new conditions.

Amending without amendments.

Hence the constitution is as flexible as the nation's methods of business or the habits of the people. It is not merely a roll of parchment reverently treasured in the archives at Washington, printed in the appendix of every textbook, and committed to memory by half the schoolboys of the country. It is not static but dynamic, a Darwinian, not a Newtonian affair. One might almost say that it is amended every Monday morning, when the Supreme Court hands down its decisions. The Fathers of the Republic, were they to rise from their narrow cells, would not recognize their handiwork, so greatly has its temper been changed. What would James Madison think of our vast array of federal reserve banks, national banks, and farm loan banks,—not to speak of bank deposits guaranteed by the federal government, home-owners' loan corporations, and a host of other credit concerns—all established under authority of a constitution which contains not one word about bank deposits, commercial credits, or farm mortgages?

The wide departure from the original philosophy.

The constitution in its broader sense.

In its broader sense, therefore, the Constitution of the United States is made up of six unequal elements. These are: (a) the original document, (b) twenty-one amendments, (c) hundreds of statutes which provide details for the general provisions of the constitution, (d) thousands of judicial decisions interpreting the constitution and the aforementioned statutes, (e) executive orders which fill in the details of statutes, and (f) a countless host of usages, customs, precedents, traditions, and even administrative opinions which have acquired the strength of law. Let us look at these various factors in the enlargement of the constitution, one by one; but not in the order above given, for it will better serve the interests of clarity to speak of the statutes, decisions, and usages before dealing with the process of formal amendment.

Development by Law

How the original constitution has developed: 1. Development by law.

The simplest way of expanding the constitution is by passing a law. Many matters, in fact, were left by the framers of the constitution to be handled in that way. Knowing that they could not provide for all contingencies, they did not try to do so, but trusted to future Congresses to provide such detailed provisions as might prove desirable.

Some examples: (a) Organization of the courts, etc.

And during the past century there has been a tremendous development through this channel. The whole structure of the subordinate federal courts is provided for by statutes and so is the procedure of these courts. The succession to the presidency, in the event of the Vice President not being available, is similarly arranged by the presidential succession act of 1886. Again, there is scarcely a word in the constitution relating either to the President's cabinet or to the organization of the various executive departments. True, there is mention of "heads of departments" but not a word about how many departments, or how they should be organized, or what functions should be performed by them. All such matters were left to be settled by law.

(b) The mechanism of government.

Similarly the present method of governing territories and insular possessions rests upon law and not upon constitutional provision. Likewise, the methods by which members of Congress are nominated, and even the determination of who shall vote at congressional elections are left to be arranged by the laws of the several states. The constitution gives Congress power to borrow money on the credit of the United States. To facilitate such borrowing a

law was passed authorizing the establishment of banks. Then these banks eventually got into difficulties and another law was passed (1933) providing for the guaranteeing of these deposits by a government agency. Thus the original power to borrow has been extended by law to the safeguarding of depositors' funds in privately owned banks. So with the budget. No provision for a national budget is made in the constitution. The whole budget procedure is established by law.

(c) The process of lawmaking.

Even the process of lawmaking has had to be built up without much guidance from the written provisions of the constitution. The constitution, for example, does not say a word about committees in Congress, who shall appoint them or what they shall do. It does not even require that bills be given three readings, or placed on the calendar, or engrossed before enactment. And of course it says nothing of filibusters, clôtures, riders, time-limits, lobbying, leave-to-print, suspension of rules, and the other incidents of modernized legislation.

Concerning the actual, present-day workings of the federal government, therefore, one cannot get any adequate knowledge by merely studying the words of the constitution itself. By far the greater portion of what the student of government desires to know is not there. It is set forth in the statute-books of the nation and the states. Hence it is sometimes said that for governmental principles one may go to the constitution, but that for governmental practice one must go to the laws.

Development by Interpretation

2. Development by judicial decisions.

In the second place, the constitution has been developed by judicial and administrative decisions. The judicial theory is that courts merely interpret and apply the printed words of constitutions and laws without adding anything or taking anything away. Yet every lawyer knows that to give a phrase a new interpretation is to give it a new meaning; and to give it a new meaning is to change it. The Supreme Court of the United States has read into the American constitution many things which are not there visible to the naked eye. It has read out of the constitution other things which are there as plain as print can make them. Mr. Justice Holmes once blurted out the truth when he said that judges "do and must legislate." The Supreme Court of the United States has done a great deal of actual legislating during the past hundred years.

Some examples:

It has done this by declaring its interpretation of the various provisions, phrases, and words in the original document. "Congress," the constitution declares, "shall have power . . . to regulate commerce . . ." But what is included within the term "commerce"? The Supreme Court has rendered at least a hundred decisions in answer to that question. This is because changes in the methods and materials of commerce have given rise to new situations and problems almost every year. It has been the work of the Supreme Court, through its power of judicial interpretation, to twist and torture the term "commerce" so that it will cover all these things. Congress has successively used its commerce power to regulate railroads, motor stages, telegraph and telephone companies, airplanes, steamship lines, radio broadcasting stations, stock exchanges, and even ordinary industrial concerns which do business in more than one state.[1]

(a) Regulation of commerce.

But there are limits to the flexibility of the commerce clause. When Congress in 1933 passed the national industrial recovery act it sought to widen the commerce power to a point where it would permit federal control over wages, hours, and methods in industries which conducted their business wholly within a single state. It did this on the theory that while such industries were not themselves engaged in interstate commerce their activities had an indirect influence upon other industries which were so engaged. But the Supreme Court in the Schechter Case (1935) declined to permit this extension of the commerce power and declared the national industrial recovery act to be unconstitutional.[2]

(b) Taxation.

Again, the constitution stipulates that Congress shall have power to "levy and collect taxes . . . to provide for the general welfare of the United States." Under the authority of this provision Congress has at various times raised money by general taxation and spent it for the benefit of certain classes, such as war veterans or flood sufferers. The Supreme Court has consistently upheld the principle that a general tax may be levied to promote the general welfare even though a single section of the country or a single class of the people is the beneficiary of the proceeds. But in January, 1936, it declared the agricultural adjustment act of 1933 (AAA) to be unconstitutional because this statute levied a

[1] See *below*, pp. 410–411.

[2] Schechter Poultry Corporation *v.* United States, 79 L. Ed. (Advance Opinions) 888; 2 U. S. Law Week, 926 (May, 1935).

special processing tax on one class of the people (the processors of agricultural products) in order that payments might be made to another class, namely, the farmers in return for their consent to curtail production,—this consent being obtained in a more or less coercive way. The court held that the "general welfare clause" of the constitution above cited does not give Congress the right to exact processing taxes in the manner and for the purposes set forth in the agricultural adjustment act.[1]

(c) War powers.

Or take another illustration. The constitution provides that Congress shall have power "to raise and support armies." These five words looked safe enough in 1787. To the minds of the men who put them in the constitution they meant that Congress might call up volunteers, furnish these soldiers with muskets, feed them, clothe them, and not leave them to go cold and hungry as the Continentals had gone at Valley Forge. But these five simple words have swollen with the lapse of time. During the World War they were broad enough to justify the drafting of several million men, the enactment of a stringent espionage act, the operation of the railroads, telegraph and telephone lines by the government, the stoppage of building operations, the cessation of all industries on certain days of each week, together with the fixing of meatless days and wheatless days for the whole civilian population. Power "to raise and support armies!" The federal government, with the Supreme Court at its right hand, wrung a vast amount of power from these five words during the years 1917–1919.

Words and their legal meanings.

Here we have, therefore, a powerful agency of verbal elongation. To find out what any word in the American constitution means, you do not look it up in a dictionary. You look it up in a digest of judicial decisions. There you find what it means in legal parlance, whatever else it may, and often does, mean in everyday speech. Voltaire once said that the Holy Roman Empire was neither holy, nor Roman, nor an empire. The Supreme Court of the United States has ruled that a direct tax on cigarettes is neither direct nor a tax. It is indirect and an excise. It has held that telegrams are commerce while insurance policies are not; that primaries are not elections; that *ex post facto* laws do not include all retroactive laws; and that the phrase "due process of law" means just about everything that a layman would not understand it to mean.[2]

[1] See also *below*, p. 447.

[2] For a discussion of this phrase see *below*, Chapter XXVII.

The steady expansion of words and phrases in the constitution.

Hence the student who desires to know what the words of the constitution really imply will find Daniel Webster a better authority than Noah Webster. If he wants to find out what the actual powers of Congress are today, he will get a poor idea of their scope and ramifications by merely surveying the eighteen formal powers which are granted in the words of the constitution itself. Supreme Court decisions have widened these original powers beyond recognition, yet never in a single instance has the court asserted its right to make any change in the phraseology. The stretching of a phrase in one decision gives a foundation for some further elasticity in the next; the lines of development are pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began. And the court's latest decision is what rules until the next one comes. "That's not what the constitution means," said a Supreme Court justice in rebuke to a young lawyer who was arguing a case before that august body. "Well, it was until Your Honor spoke," was the courteous and correct reply.

The construing of constitutional provisions by administrative rulings.

And it is not the courts alone that interpret the constitution. Administrative officers, from the President down, are often confronted with the necessity of acting when their constitutional powers are not clear. Their actions may be challenged and subjected to judicial review, but very often they are accepted without any such protest. In that event the action forms a precedent for the future. It does not form a binding precedent, of course, for no administrative ruling, however long acquiesced in, is certain to be upheld by the courts. Nevertheless, when any administrative interpretation of a constitutional clause has been allowed to pass for a long time unchallenged, and particularly when important public or private rights have been based upon it, the interpretation is likely to be accepted. In recent years there have been many executive orders and administrative rulings which virtually operate as agencies of constitutional development. The opinions of the attorney-general, given for the guidance of the executive departments, afford a good illustration.

Development by Usage

3. Development by usage.

In the third place the constitution has been developed, expanded, and modified by usage or custom. What habit is to the individual, usage is to the state. Nations, like men, get into the

habit of doing things in a given way. Habit then becomes hardened into a national usage, which is sometimes very difficult to change. So, like a pyramid reared upon the written constitution, there has been built up in America a body of political customs and usages which have their basis neither in laws nor judicial decisions, but are merely the result of long-continued habit. This process, moreover, goes on continually. Usage is always at work—adding, subtracting, altering, and influencing the substance of the written constitution and laws.

Some examples:

What are some of the usages that have modified, developed, and fixed the political institutions of the United States? The most striking usage, perhaps, concerns the method of electing the President. In this election the written provisions of the constitution have been so greatly altered by long-continued usage that anyone reading them would gain an entirely false impression. The constitution took for granted that the presidential electors would meet in the several states and would survey the whole field of possibilities before casting their votes. No preliminary nominations were anticipated. But political parties came into the field and began nominating their candidates before the presidential electors were chosen. The latter, thereafter, had virtually no choice but to vote for these candidates. They became automatons with a purely mechanical function, and today they form a wholly superfluous cog in the machinery of election.

(a) The actual method of electing the President.

Yet there is nothing to prevent their doing just what the constitution contemplated that they would do. It is merely that usage has become stronger than the constitution itself. Under normal conditions the President of the United States is now almost as directly chosen by the voters of the states as though there were no intervening electors at all. In other words there has developed precisely what the architects of the constitution sought to avoid. They did not desire the direct, popular election of the nation's chief executive, and they spent much thought in devising a scheme for preventing it.

The usage with respect to residence.

There are some cases, on the other hand, in which usage prevents what the constitution permits. For example, there is nothing in the original constitution to debar the election of both the President and Vice President from the same state. At first glance the twelfth amendment might seem to stand in the way of such a choice; but if you will read the first few lines of it carefully you

will see that it does not. Nevertheless the President and Vice President have never been chosen from the same state at the same time, and probably never will be. Custom dictates that they shall be nominated not only from different states but from different regions of the country. So it is with candidates for election to the national House of Representatives. The constitution merely requires that a member of Congress shall be a resident of the state from which he is chosen. But usage goes further and requires that he be a resident of the district which chooses him.

(b) The cabinet.

When President Wilson went to the Paris peace conference in 1918 he asked Vice President Marshall to preside at cabinet meetings during his absence. At once his critics began thumbing the pages of the constitution in quest of his authority to do this. Of course they found nothing. And when President Harding, in 1921, invited Vice President Coolidge to attend all meetings of the cabinet there was a similar raising of eyebrows by the politically unsophisticated. But the simple fact is this: so far as the constitution and laws of the United States are concerned, the President can call to his cabinet, at any time, anybody he pleases. He could take the entire population of Washington into his cabinet without exceeding his plenary powers. He could ask "the forgotten man" to preside or he could even discontinue its meetings altogether. For there is no provision in the constitution relating to the cabinet. This body, therefore, is whatever the President chooses to make it. Not law but usage causes him to call the ten heads of departments into a weekly conference and set his own chair at the head of the table.

(c) The machinery and work of political parties.

But the most important development which has come about in the field of American government as the result of usage is embodied in that complicated fabric which we call party system. The leading statesmen of 1787 looked upon the rivalry of political parties as a thoroughly vicious feature in free government, hence the constitution contains no mention of caucuses, primaries, conventions, platforms, party committees, campaign funds, and the other paraphernalia of modern party politics. Yet political parties sprang into existence almost at the outset and gradually became dominating factors in the work of the new federal government. The whole party system as we now know it,—its organization, personnel, and methods, its manipulations both in Congress and outside—all this has been developed in the realm of unwritten

law. Only in recent years have the laws of Congress attempted to regulate party organizations and even yet these regulations go but a little way. Usage has created and maintains the party system, but who will say that party organizations do not profoundly affect both the constitutional practices and the political life of the American people?

(d) Other examples.

Various other examples of institutions and practices which owe their existence to usage might be given. Custom has established the principle that no President shall have more than two consecutive terms. Why do all American ambassadors tender their resignations when a new administration comes in? Why are many appointments in the federal service treated as "political patronage"? Why does the Supreme Court hand down its decisions on Monday and why are elections held on Tuesday? Why are the heads of the war and navy departments chosen from civilian life whereas the department of labor is always headed by a "labor man"? Why is the head of the nation addressed simply as "Mr. President" while the governor of Massachusetts is styled "His Excellency" and the mayor of New York is "His Honor"?

Even usages, however, may change. For a full century no President ever read his messages to Congress. The custom was to send them in writing by messenger. But President Wilson changed this custom, setting aside the precedents of a hundred years, and the new practice has been continued by some of his successors. From Washington to Taft, moreover, no President during his term of office ever left the jurisdiction of the United States. But President Wilson shattered this long-standing continuity of practice also. First and last he departed more frequently from established customs than any of his predecessors had done. One must not conclude, however, that usage is a frail reed easily broken. Now and then individual usages are snapped, but most of them display great powers of endurance.

Growth by Amendment

4. Development of the constitution by formal amendment.

Finally, the constitution has been developed by formally amending it. Its framers foresaw that the need for amendments would frequently arise, and they tried to make the process of amendment a workable one. That is why they provided four alternative methods of putting an amendment through. They made it possible to initiate an amendment in Congress, or outside Congress.

They provided for ratification in state legislatures, or outside, by conventions. Of course it was not anticipated that only one of these alternatives would ordinarily be used. But the first ten amendments were proposed in a batch by Congress and submitted to the state legislatures as the quickest way of getting them ratified. This action set a precedent which was followed in the case of the next ten amendments. Not until the ratification of the twenty-first amendment were conventions used instead of the state legislatures.

The four alternative methods of amending the constitution cannot be more clearly or concisely described than by using the phraseology of the document itself:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress." [1]

Some questions relating to the process of amendment.

Now while this is a model of conciseness and clarity, as legal drafting goes, it leaves some important questions unanswered. Does the phrase "two-thirds of both Houses" mean two thirds of all the members, or two thirds of those present? The latter interpretation has prevailed. Does the action of Congress, in voting to propose a constitutional amendment, require the assent of the President? The Supreme Court has held that it does not. When a state legislature has ratified a proposed constitutional amendment, may it later (before the necessary three fourths has been obtained) rescind its action? Congress, by a joint resolution, has declared that this cannot be done. On the other hand a state legislature may first refuse to ratify, and then, at a later date, change its mind. And when a state legislature votes to ratify an amendment its action is not subject to veto by the governor.

Time-limits on ratifications.

Then there is the question whether Congress, in proposing an amendment, may fix a limit of time within which the ratification must be completed. This Congress did, for example, in the case of the eighteenth, twentieth, and twenty-first amendments—fixing seven years as the maximum time for ratification in each case.

[1] Article V.

The Supreme Court has held that this is allowable. Finally, may a state legislature, when a proposed amendment comes before it for ratification, submit the question to the people by referendum? Of course there is nothing to prevent the submission of the question to the people, provided the legislature itself takes formal action after the people have expressed themselves; but a state legislature may not submit an amendment to the people for final decision, thus abdicating its own powers.[1]

Certification of amendment.

When Congress initiates a proposed amendment, the secretary of state sends a certified copy of it to the governor of each state and he, in turn, transmits it to the legislature. Then when the legislature ratifies the amendment the governor so certifies to the secretary of state in Washington and the latter, on receiving certificates from three fourths of the governors, proclaims the amendment to be in force.

Barriers to amendment.

There are two points upon which the constitution is not open to amendment without a breach of faith. No state, without its own consent, can be deprived of its equal representation in the Senate. And no state can be divided, nor can any two states be combined, without the consent of the legislatures concerned.[2] Whether these restrictions form insuperable barriers to amendment is by no means beyond question. An unamendable constitution would be a contradiction in terms. As respects equal representation in the Senate the question is of academic interest only, because there are enough small states to prevent the ratification of any amendment that tried to take this equal representation away.

The first ten amendments.

Only twenty-one amendments have been made to the national constitution in nearly one hundred and fifty years. The number is really much smaller, for the first ten amendments, which were all submitted at the same time, might well have been combined into a single one. The remaining eleven amendments fall into three groups. The eleventh and twelfth were designed to remedy ambiguities and defects in the original constitution,—perfecting amendments, they might be called. The eleventh was a direct result of a Supreme Court decision (Chisholm *v.* Georgia) which held that a citizen of one state could sue another state in the federal courts, under the constitutional provision which extended

The eleventh and twelfth.

[1] Hawke *v.* Smith, 253 U. S. 221 (1920), Cushman 1.

[2] This is inserted in the constitution as a limitation upon the powers of Congress; but it operates as a limitation upon the power to amend the constitution.

the judicial power of the federal government to "suits between a state and citizens of another state." This affirmative interpretation of the judicial power aroused the champions of states' rights, who bestirred themselves to have the sovereign immunity of the states made clear, and they succeeded. The other amendment, the twelfth, was proposed and adopted because the presidential election of 1800 demonstrated the need of changing that section of the original constitution which dealt with the choice of a President and Vice President.

The Civil War amendments.

For sixty-one years no further amendments were adopted although many were proposed. Then came the Civil War, and after its close the post-war amendments,—thirteenth, fourteenth, and fifteenth,—embodying the principles for which the victorious northern states had been contending. These three amendments embody, as it were, the terms of peace. They were submitted to the legislatures of the states which had seceded and acceptance was made an essential of readmission to the Union. Ratification of the three amendments was virtually imposed upon these states by the triumphant North. The southern states resented this procedure and they have managed to make one of the post-war amendments, the fifteenth, virtually inoperative.

The last six.

Again there was a long interval during which no further amendments were made. Time and again proposals were made in Congress but they failed to obtain the necessary two-thirds majority. Meanwhile, however, public sentiment was developing along various lines—in favor of tax reform and the direct election of United States senators, for example. Accordingly within the short space of twenty years, 1913–1933, the ratifications of six amendments were proclaimed. Of these the sixteenth permitted Congress to levy and collect taxes on incomes without apportioning these taxes among the states; the seventeenth provided for the direct election of senators; the eighteenth inaugurated a short-lived experiment in national prohibition; the nineteenth established woman suffrage; the twentieth changed the date of the presidential inauguration and abolished the "lame duck" session of Congress, while the twenty-first amendment repealed the eighteenth. The last of these amendments went through so rapidly that the rest of the world was amazed.

Nevertheless the constitution has not been greatly changed by these twenty-one amendments. Most of them impose restraints

rather than add powers or change methods. Constitutional amendments in the United States have been relatively few because there are so many easier ways of gaining the same end. The election of the President by what is essentially direct popular suffrage has been secured by the coöperation of the state legislatures. If the various state legislatures, however, had persisted in naming the presidential electors themselves and had not turned this function over to the people, there is little question that a constitutional amendment would have accomplished the change long ago. Amending the constitution, far from being a first recourse, is a method of last resort for obtaining what cannot be had by statute, by usage, or by judicial interpretation.

Amendment as a last resort.

It is not in the general framework but in the practical workings of American government, in the things which the laws and usages determine, that most of the changes have taken place. The people of the United States live under a far more powerful and more democratic national government today than in the closing years of the eighteenth century. This is not because there has been a revolution or a new deal. It is because so much development has been possible within the broad terminology which the framers of the constitution employed and because the Supreme Court, during most of its history, has shown a friendliness towards the expansion of federal authority.

American government has become more democratic.

And, after all, the *form* of a government reaches but a little way. It is the *spirit* that giveth life. "Constitute government how you please," Edmund Burke once wrote, "the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of ministers of state. . . . Without them your commonwealth is no better than a scheme on paper, and not a living, active, effective organization." The constitution is not a "horse-and-buggy" affair projected into a motorized age, but in almost every line it has been expanded, modified, and brought into articulation with the life of each succeeding age. Among the constitutions of the twentieth-century world it is one of the most up-to-date, the most thoroughly modernized. It is easy to pick flaws in this fundamental law of the nation, but what body of men is there nowadays that could be trusted to frame a better one?

Form versus spirit.

So the government of the United States ought to be studied, not merely as a series of laws but as a mechanism handled by men,—not as a mere heritage from the past but as a going concern. The

American constitution was born in the eighteenth century, grew to full vigor during the nineteenth, and is greatly altering its visage in the twentieth. Many of the young men and women who are now in college will live to celebrate its bicentennial in 1987. What kind of a constitution will it be on this two-hundredth birthday?

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CHAPTER VII

CITIZENSHIP AND CIVIL RIGHTS

Before man made us citizens, great nature made us men.—*James Russell Lowell.*

Who are citizens?

The entire population of the United States may be divided into two unequal groups,—citizens and aliens. The first outnumbers the second by more than ten to one. But who are citizens of the United States and how have they obtained that status? The constitution uses the term "citizen" seven times, but nowhere defines it. Apparently it was assumed that the existing rule of English law would be followed, namely, that allegiance determined citizenship, and hence that all persons owing allegiance to the United States would be regarded as citizens. On the other hand the constitution also contemplated a double citizenship, for it speaks of "citizens of the different states" as well as "citizens of the United States." By doing this it raised some embarrassing questions. Could an individual be a citizen of the United States without being also a citizen of some state in the Union? Or could he have state citizenship without possessing national citizenship?

The old controversy over dual citizenship.

During the second quarter of the nineteenth century a great deal of controversy arose as to whether there were really two citizenships or merely two phases of the same citizenship. Some contended that the two citizenships were separable, and that citizenship of the United States was not a necessary consequence of state citizenship. A state, they maintained, might confer its own citizenship upon individuals without thereby giving them the privileges of American citizens. Others argued that the two citizenships were necessarily conjoined. No one, they said, could be a citizen of a state without becoming also a citizen of the United States, and vice versa.

The Dred Scott decision.

After a great deal of discussion in pamphlets and speeches this issue finally came before the Supreme Court in the Dred Scott Case (1857) where the issue turned on the question whether a state could grant citizenship to a negro, and if so whether this made him a citizen of the United States. Under the leadership of

Chief Justice Roger B. Taney, the court upheld the dual-citizenship doctrine in these words:

> "It does not by any means follow that because he (Dred Scott) has all the rights and privileges of a citizen of a state, he must be a citizen of the United States. He may have all the rights and privileges of a citizen of a state and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the Constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them." [1]

This astounding decision left the situation in a hopeless muddle. A state might confer citizenship upon an alien without making him a citizen of the United States. This would leave him without the status of a citizen in international law, for the individual states were not recognized by foreign countries as having power to naturalize anybody. Moreover, since the southern states did not accord citizenship to negro slaves, this decision placed them in the category of men without any citizenship at all.

Reversed by the fourteenth amendment.

Nevertheless the matter had to remain in this anomalous situation while the Civil War was being waged. Lincoln's Emancipation Proclamation freed the slaves but did not confer American citizenship upon them. When the war was at an end, however, Congress passed the civil rights act of 1866 which provided that all persons born in the United States and not subject to any foreign power were to be deemed citizens. This was followed, two years later, by the adoption of the fourteenth amendment which decreed that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside," thus definitely rejecting the doctrine of separable citizenship which had been enunciated in the

[1] Dred Scott *v.* Sandford, 19 Howard, 393.

Dred Scott decision. By this amendment citizenship of the United States was made primary and fundamental. Since its adoption every citizen of the United States by birth or naturalization has automatically become entitled to be a citizen of a state by establishing his legal residence there. And no matter where he resides, his privileges and immunities as a citizen of the United States must not be abridged.[1]

The duality, however, still exists, although it is of no general importance.

So far as the rules of international law are concerned, only one citizenship is now recognized, namely, citizenship of the United States. All American citizens carry the same form of passport, signed by the secretary of state at Washington. But the rules of constitutional law still recognize the double character of American citizenship, the fourteenth amendment being explicit on that point when it uses the words "citizens of the United States and of the states wherein they reside." This duality, however, is no longer of importance because the states do not naturalize citizens. They may give an alien all the privileges which are accorded to their own citizens, but such action does not make anyone a citizen of the United States. The states may permit an alien to vote, to serve on a jury, to hold office, and to own property. On the other hand it is possible to be a citizen of the United States without being a citizen of any state, as in the case of those who reside in the District of Columbia.

Citizenship by birth.

The wording of the fourteenth amendment might at first glance seem to be perfectly clear, but in reality it is not. For it will be noted that the words "subject to the jurisdiction thereof," introduce a qualification. They imply that birth in the United States is not conclusive in establishing American citizenship; one must be born within the jurisdiction as well as within the boundaries. The Supreme Court has held, for example, that North American Indians born within tribal jurisdiction are not citizens by birth, and can only become citizens by action of Congress.[2] Children born to foreign ambassadors stationed in the United States are not American citizens by birth inasmuch as foreign embassies are deemed to be outside the jurisdiction.[3] By a legal fiction they are assumed to be part of the country which the ambassador represents. On the

[1] Arnold J. Lien, *Privileges and Immunities of Citizens of the United States* (New York, 1913).

[2] In 1924, however, Congress authorized that special certificates of citizenship be granted to all such Indians.

[3] The same rule applies to persons born on foreign vessels in American waters.

other hand a person may be born within the jurisdiction but not within the United States—in the Philippine Islands, for example. The Supreme Court has held that since the Philippines are "unincorporated territory" of the United States, a Filipino does not acquire American citizenship by being born there. He becomes a citizen of the Philippine Islands, and the so-termed Philippine independence act of 1934 provides that "all citizens of the Philippine Islands shall owe allegiance to the United States" until July 4, 1946.[1]

Nor are these the only complications involved in the determination of American citizenship by birth. The fourteenth amendment declares that all persons born in the United States and subject to the jurisdiction thereof shall be citizens, but it does not say that no other persons shall be citizens by birth. It is quite possible, therefore, for a person to be born outside the boundaries of the United States, outside its jurisdiction also, and yet be an American citizen by birth provided his parents are American citizens. This is because the basis of citizenship by birth rests in the United States upon a commingling of two legal doctrines, known to lawyers as the *jus soli* and the *jus sanguinis*.

Jus soli and *jus sanguinis.*

The *jus soli*, which is the English legal principle, regards place of birth as the controlling factor, while the *jus sanguinis*, which is derived from the law of Rome, puts the stress on parentage. France, Italy, and other European countries in which the legal system is based on Roman law, still hold parentage to be the deciding factor. Hence any child wherever born, if born of French parents, is deemed to be a French citizen. England, on the contrary, holds to the *jus soli* and stresses place of birth, not parentage. Anyone born on British soil is claimed as a Britisher no matter what the nationality of his parents. The United States displays a generosity almost unique among the nations by recognizing both birthplace and parentage as alternative qualifications. In general, therefore, persons born on American soil and within the jurisdiction are entitled to claim American citizenship no matter who their parents are, while children born of American parents, residing outside the United States, are entitled to claim American citizenship if certain formalities (mentioned below) have been complied with.

The native born.

Who, then, are American citizens by birth? The answer is twofold: First, all persons, of whatever parentage, born on American

[1] See also *below*, Chapter XXVIII.

soil, and subject to the jurisdiction of the United States. American soil, for this purpose, includes American embassies abroad, American ships of war anywhere (even in foreign ports) and American merchant vessels on the high seas. It includes Alaska, Hawaii, and Puerto Rico, but does not include the Philippines. It matters not that a child's parents are both aliens, or even aliens ineligible for naturalization. It is enough that the child is born within American territory and jurisdiction. Thus the American-born child of Chinese parents, domiciled in the United States, is an American citizen by birth although his parents are themselves ineligible to become citizens.[1]

The foreign-born of American parentage.

Second, all persons of American parentage born elsewhere than on American soil are citizens of the United States. This rule has been in force for three-quarters of a century. But by an act of Congress, passed in 1907, it is provided that all such persons, if they remain in the countries of their birth, must register with an American consulate, at the age of eighteen, their intention to remain American citizens, and at the age of twenty-one must take the oath of allegiance to the United States. It should also be added that unless they take up and retain residence in American territory the United States will not protect such persons from obligations (in the way of military service, etc.) which the country of their birth may claim from them. Similarly, if persons born of foreign parentage in the United States go back to the country in which these parents were born, they do so with the understanding that the United States will not necessarily protect them against the civil claims of that country.

Citizenship by naturalization.

Citizenship may be acquired not only by birth but by naturalization. Under the Articles of Confederation each state retained the right to naturalize aliens but this arrangement resulted in confusion, so the constitution conferred on Congress the right "to establish a uniform rule of naturalization," thereby giving it complete power over the conditions and procedure. Naturalization is the transformation of aliens into citizens. It may be either collective or individual. In the former case whole bodies of persons are admitted to citizenship at one stroke, as when new territory is annexed to the United States and the inhabitants of such territory taken within the fold of American citizenship by treaty or by act of Congress. This was done in the case of Texas. Likewise the act

Collective naturalization.

[1] United States *v.* Wong Kim Ark, 169 U. S. 649 (1898).

of Congress which provided a civil government for Hawaii in 1900 conferred American citizenship on all those who had been citizens of the Hawaiian Republic. On several other occasions, when the United States has acquired new territory by treaty, the inhabitants of these territories have been collectively naturalized.[1]

Mere conquest does not entail collective naturalization.

But the mere acquisition of new territory by the United States does not admit the inhabitants to American citizenship. There must be a specific provision either by treaty or by action of Congress. The treaty with Spain in 1898, by which the United States acquired Puerto Rico and the Philippines, contained no such provision; on the contrary it stipulated that the annexation of these islands should not operate to naturalize the Puerto Ricans and Filipinos. In 1917, however, Congress granted full status as citizens of the United States to the Puerto Ricans. To the Filipinos it gave some of the privileges and immunities of citizens; but it never made them citizens of the United States. Collective naturalization is thus a legislative act, to be sharply distinguished from individual naturalization which is a judicial act, performed by the courts.

Individual naturalization.

Individual naturalization, as the term implies, is the process of converting aliens into citizens one by one. The procedure is established by federal statutes, more particularly by the naturalization act of 1906. While the actual process of individual naturalization is performed by the courts, the preliminaries are supervised by a bureau of naturalization in the federal department of labor. This bureau maintains representatives at various centers throughout the country. It is their business to assist applicants for naturalization and to relieve the courts from the necessity of checking up on the facts stated in the applications.

Steps in naturalization:

There are three steps in the naturalization procedure, all of which must be taken before a federal district court or a state court of competent jurisdiction. The first step, commonly called "taking out first papers," is a formal declaration of intention to become a citizen. This declaration may be made by any qualified alien, that is one who, being able to speak the English language, is "a white person, or of African nativity or of African descent." [2]

1. The declaration of intention.

[1] For example, the Louisiana treaty of 1803; the Florida treaty of 1819; and the Alaska treaty of 1867. And in 1927 the inhabitants of the Virgin Islands were collectively admitted to American citizenship by act of Congress.

[2] It will be noted that this wording excludes Chinese, Japanese, Hindus, and in fact nearly all Asiatic aliens. Armenians, however, have been held to be "white persons."

Such declaration may not be filed, however, until the alien has reached the age of eighteen years. It must contain information as to the applicant's name, age, parentage, occupation, country of origin, and time and place of arrival in the United States; it must further declare his intention to renounce his former allegiance and become an American citizen. A copy of this document, under the seal of the court, is given to the alien, and must be presented by him when he applies for final naturalization.[1]

2. The filing of a petition for citizenship.

After not less than five years' continuous residence in the United States, and not less than two nor more than seven years after an alien has filed his declaration of intention, he may take the second step. This involves the filing of a petition for citizenship. It may be presented in any one of the various courts designated by law as having authority over naturalization matters, provided that he has lived within the jurisdiction of the court at least one year immediately preceding the filing of his petition. The petition must be signed by the applicant himself, and must give full answers to a set of prescribed questions. If the alien has arrived in the United States since June 29, 1906, his petition must also be accompanied by a document from the United States immigration authorities certifying the time and place of his arrival. In addition he must file with his petition the sworn statements of two witnesses (both citizens of the United States) in personal testimony to his five years' continuous residence and his moral character, as well as in substantiation of the other claims made in his petition. After this paper has been filed with the clerk of the court it must be kept without action for at least ninety days during which time a notice of its filing is publicly posted. In this interval an investigation of the petitioner's statements is made by an agent of the bureau of naturalization.

3. The granting of naturalization or "final papers."

All these formalities having been attended to, the petitioner awaits the third and final step. The court sets a date for a hearing upon the petition. This hearing must be public, and cannot take place within thirty days preceding any regular federal or state election. The applicant must answer such questions as are put to him by the presiding judge, who may also demand proof that the applicant understands and is attached to the principles em-

[1] Citizenship may be acquired, however, without formal declaration of intention by aliens who have served a certain term in the United States army or navy and have been honorably discharged therefrom.

bodied in the Constitution of the United States. The rigor of this examination depends on the judge. He may inquire whether the applicant is willing to fight for his new country.[1] He may ask him whether he understands what a writ of habeas corpus is, how presidential electors are nominated, where the Supreme Court gets its power to declare laws unconstitutional, and what is meant by the right of eminent domain.

Since 1920, however, it has been the practice to have examiners from the bureau of naturalization perform this work of inquiring into the applicant's knowledge of American government. Then the judge usually takes the examiner's word for it. In any event, if the court is satisfied that the applicant is of eligible nativity or descent, has lived continuously for five years in the United States, can speak the English language, is of good moral character, a believer in organized government, understands and is attached to the principles of the constitution,—if the court is satisfied on all these points, the judge administers the oath of allegiance and authorizes the clerk to issue letters of citizenship, or "final papers" as they are more commonly called. Then the alien is a full-fledged citizen.

Reasons for the strictness of the present naturalization laws.

What a long gauntlet these aliens have to run in order to be able to say *Civis Americanus sum*. Rather strangely we exact from the naturalized citizen higher standards of character, intelligence, and patriotism than we expect from those who happen to have been born within the United States. For not all native-born Americans can produce credentials certifying to their moral uprightness, their knowledge of the nation's government and their willingness to defend the constitution right or wrong. The long roll of red tape which encircles our naturalization procedure, however, represents an endeavor to get rid of the various abuses which existed under the older naturalization laws. In those good old days great crowds of aliens were sometimes admitted to citizenship during the days immediately preceding an election, when no

[1] In two cases which attracted wide attention the Supreme Court held that admission to citizenship could properly be denied to any applicant who refused to affirm a willingness to serve in the armed forces of the United States if called upon. One of these applicants was a woman. See the decision in United States *v.* Rosika Schwimmer, 279 U. S. 644 (1929). The other was a professor of theology at Yale University. See the decision in United States *v.* MacIntosh, 283 U. S. 605 (1931). In rendering these decisions the court had no discretion other than to apply the naturalization law which does not provide for any reservations to the oath of allegiance but requires every applicant to swear that he will "support and defend the constitution . . . against all enemies, foreign and domestic."

careful investigation of their statements was possible. Paid witnesses were provided by the party machine to help the process along, and indeed the naturalization of newly-arrived foreigners became one of the regular activities of the ward boss in every large city. The voters' list in such cases was regularly padded with the names of aliens who had not been a year from Ellis Island.

The gradual elimination of abuses.

Since 1906 these abuses have been largely eliminated but the new procedure is long-drawn-out and hard for the average foreigner to understand. Moreover, the judge (or the bureau examiner) can make the examination of an alien easy or difficult. He can ask a few perfunctory questions or he can give an oral examination that would flunk a college graduate. He can make sure that the applicant actually speaks and understands the English language (which is what the law assumes), or he can be satisfied with a nod or a shake of the head in answer to his questions. And of course almost any alien can nod and shake his head in English. On the whole, however, the procedure is now being impartially and uniformly administered in all parts of the country.

Citizenship of wives and children.

It is a rule, generally recognized among nations, that the naturalization of a father carries with it the naturalization of all his legitimate children under twenty-one years of age provided they are resident in the country with him. Likewise the naturalization of a husband makes his wife a citizen. This rule was followed in the United States until after the close of the World War. An alien woman (if herself eligible for naturalization) became an American citizen if she married one, and conversely an American woman lost her citizenship if she married an alien. This, of course, was a simple and easy arrangement, but during the war it led to many embarrassments. American-born women who had married Germans suddenly found themselves rated as alien enemies in the United States while German-born women who had married Americans found themselves similarly treated in Germany.

The Cable act (1922).

By the Cable act of 1922, therefore, Congress abrogated the old rule, so that marriage no longer operates either to give citizenship or take it away. A woman of foreign citizenship who marries an American does not now become an American citizen thereby. She can become a citizen only by naturalization; but in her case a single year of residence is required and the formal declaration of intention is not needed. On the other hand an American woman who marries a foreigner does not lose her American citizenship,

but she may renounce it and assume her husband's citizenship if she desires. Moreover, if an alien woman residing in the United States (being herself eligible for naturalization) marries another alien who is eligible for naturalization but does not choose to take advantage of his opportunity, the alien wife may go ahead and get herself naturalized without him.

And the resulting confusion.

These changes by the act of 1922 were intended to "recognize the right of women to their own individuality." While the intent was commendable the workings of the law have not been altogether satisfactory. Much confusion has resulted, because other countries hold to the old rule. The American citizen who marries an alien woman gets a wife who has no citizenship at all, while the American woman who marries an alien becomes invested with two citizenships. When a husband and wife travel together with passports which have been issued by two different nations it is not surprising that immigration officers in foreign countries are perplexed.

How citizenship may be lost.

There is a Latin maxim: *Nemo potest exuere patriam*—no one can give up his native citizenship. Some European and Asiatic countries still hold to that rule (or try to), but it has long since been abandoned by the United States. American citizenship is given up by becoming naturalized in some other country, or even by taking the oath of allegiance to some other country.[1] There is a common belief that persons lose their citizenship when convicted of serious crimes and sent to prison. But what they lose is their political privileges, including their right to vote, not their citizenship.

Is a corporation a citizen?

Are corporations citizens? Not literally so, but for most judicial purposes they are. A corporation is legally deemed to be a citizen of the state in which it has been organized. The legal doctrine may be briefly stated as follows: The citizenship of a corporation is determined by the citizenship of the persons composing it; but when the corporation receives its charter in a state, the presumption is that its members are citizens of that state, and this presumption may not be rebutted by any averment or evidence to the contrary. A corporation chartered in New Jersey, therefore, is by legal fiction a citizen of that state and as such entitled to the equal protection of the laws in all other states.

[1] Enlistment in a foreign army customarily involves taking such an oath and forfeits citizenship. But in 1917 Congress passed an act providing that American citizens who enlisted in the armies of the Allied Powers could regain their citizenship by taking the oath of allegiance to the United States.

Hence in determining whether a suit to which a corporation is a party shall be brought in the federal courts (in accordance with the constitutional provision which gives these courts jurisdiction over controversies "between citizens of different states") the corporation is deemed to be a citizen of the state in which it was chartered. But while it is regarded by the courts as having a sort of judicial citizenship, a corporation is not a citizen in the full sense of the term, and is not entitled to all the "privileges and immunities" which the constitution guarantees to the individual citizen. It is quite permissible, accordingly, to make reasonable discriminations in the laws of any state, between corporations chartered there and those chartered elsewhere, and to give to the former some privileges which are denied to the latter.

Suits between American corporations of diverse state citizenship.

American citizens by birth and by naturalization are on a plane of legal equality save in two respects. A naturalized citizen cannot become President or Vice President of the United States. And a naturalized citizen is not entitled to American protection against services (such as military service) which may be claimed from him by the country of his former allegiance if he goes back to that country. But he will be protected so long as he stays in the United States. Even aliens in the several states of the Union are entitled to the "equal protection of the laws." Apart from the right to hold office and to vote, the legal status of an alien in the United States does not differ appreciably from that of the citizen. For he is taxed like a citizen; he may sue and be sued in the courts; may own property, practice any legal trade,[1] send his children to the public schools, and be generally protected in all the fundamental rights. So long as he behaves himself he is not reminded of his alienage—save on election day.

The equality of all citizenship howsoever derived.

Civil Rights

What are the "constitutional rights" of the American citizen? We hear much about these rights—often from people who have strange notions as to what they are. Thus one hears of the citizen's right to personal liberty, to freedom from arrest without warrant, freedom of speech, freedom to march in a procession with provocative banners, and so forth. As a matter of fact nothing is much more difficult to make than a list of the American citizen's consti-

The citizen's constitutional rights.

[1] In some states, however, aliens are debarred from employment on public works and excluded from certain professions such as the practice of law.

tutional rights as they have been interpreted by the courts. It would take a whole volume to name them—with all their qualifications and limitations.

It is true, of course, that the federal constitution, including its amendments, enumerates a considerable number of rights which must not be denied, impaired, or abridged; but this enumeration is not intended to be complete. On the contrary the national constitution expressly declares that the mention of certain rights shall not be construed to deny or disparage others. The state constitutions, moreover, are prolific in their assertion of civil rights, and here again the enumeration is not intended to be all-inclusive. To make the confusion worse, the federal and state courts have been strict in their interpretation of some rights and liberal in construing others. So we have nowhere a complete statement of just what rights an American citizen possesses or does not possess. And if such a list were compiled today it would be inaccurate tomorrow, for the courts are continuously modifying their interpretations of individual rights.

Suffrage is not one of them.

But many things which the average citizen claims as his constitutional rights are not rights at all. The right to vote, for example, is not a right guaranteed by the federal constitution. The Supreme Court has made it clear, on more than one occasion, that "the Constitution of the United States does not confer the right of suffrage on anyone." [1] It merely declares that the suffrage shall not be denied on certain grounds, namely, race, color, previous condition of servitude, or sex. But it may be denied for lack of age, residence, literacy, or even property. Voting is a privilege, not a right.

Nor is office-holding.

There is no constitutional right, moreover, to hold public office, to serve on a jury, to practice law, to be a policeman, to keep a drug store, to attend a state university, or to drive a motor car on the public highways. The laws determine, in all such cases, what the qualifications shall be. The popular mind confuses *rights* and *privileges*. It uses one term when it means the other. There is a world of difference between the two, as anyone can readily ascertain by consulting a dictionary.

The rights of the citizen are formulated, first, in a series of limitations which the national constitution contains, some of them in the original document and some in the articles of amendment,

[1] Minor *v.* Happersett, 21 Wallace, 162.

particularly in the first ten amendments which, taken together, are commonly called the bill of rights. These rights, as there stated, include (1) the right to be immune from punishment by any bill of attainder or *ex post facto* law, (2) to have the privilege of the writ of habeas corpus except when the public safety may require its suspension, (3) to enjoy freedom of worship, freedom of speech, freedom of the press, freedom to assemble peaceably, and freedom to petition the government for the redress of grievances.

The inalienable rights secured: 1. By the national constitution.

They include likewise (4) the right to keep and bear arms when so authorized by the militia laws of any state, (5) to be immune from the billeting of soldiers except in time of war [1] and then only in a manner prescribed by law, (6) to be secure in person and in home against unreasonable searches and seizures and from the issue of search warrants without probable cause supported by oath, (7) to be given in the federal courts all manner of judicial protection including security against trial for any serious crime except upon action of a grand jury, and (8) assurance against being twice placed in jeopardy for the same offense, (9) to be assured a speedy and public trial by jury, (10) to be informed of charges, (11) to be confronted with witnesses, (12) to have the assistance of counsel, (13) to have jury trial also in important civil cases, (14) to be free from the requirement of excessive bail, and (15) not to be subjected to any cruel or unusual punishment.

Finally they comprise (16) the right to be free from bondage or involuntary servitude save as a punishment for crime, (17) the right to be protected in life, liberty, or property unless deprived thereof by due process of law, and (18) to receive in all parts of the Union the equal protection of the laws.[2] In addition everyone has (19) the right to pass freely from state to state, (20) to acquire a residence in any state and to be accorded the same privileges as those who are already residents there, (21) to sue and be sued in the courts, (22) to own property, (23) to carry on any legitimate business in accordance with the general limitations laid down by law, (24) to have no property taken from him for public use with-

[1] Colonel Theodore Roosevelt, in writing of his experiences as a billeting officer in France says, "I knew nothing about billeting except that it was forbidden by the Constitution of the United States." *Average Americans* (New York, 1920). He should have added "except in time of war"—a highly important exception.

[2] For an explanation of "due process of law" and its history see Chapter XXVII.

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out just compensation, and (25) to be assured a republican form of government.[1]

The foregoing list is not complete.

This list of twenty-five rights guaranteed by the Constitution of the United States does not form a complete catalogue of them all, but only of the fundamental ones. It does not apply to citizens only but in many cases includes all persons, nor does it prevent anyone from retaining and asserting rights other than those enumerated.[2] Neither does it debar the state constitutions from establishing additional rights. When a state constitution, for example, provides that every person accused of crime shall have the right of trial by jury, this inhibits the legislature from abolishing the jury system and restrains the courts from reaching the same end in a roundabout way by changes in judicial procedure. It sets up a guarantee and at the same time a limitation. The exact scope of these limitations, however, will be the theme of a later chapter.[3]

2. By the state constitutions.

For the most part the guarantees in the national constitution protect the individual's rights against the national government only. The provision for trial by jury in the national constitution, for example, applies only to the federal courts. But virtually all the state constitutions likewise guarantee trial by jury, so that the jury system is established in the state courts as well. No right conferred by either the national or state constitutions, however, is unlimited. The right of free speech does not imply the liberty of every citizen to say what he pleases, regardless of its truth or falsity. The right to freedom of worship does not entitle a Moslem to contract polygamous marriages, under the guise of practicing the tenets of his faith. The right to freedom of the press gives no license to print libels. As the Supreme Court once said in quite another connection: "The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It

[1] These various rights are discussed under the appropriate headings in various later chapters.

[2] The Supreme Court has never, in any of its decisions, attempted to make a definitive list of the citizen's constitutional rights. The nearest approach to its doing so was in the Slaughter House Cases (16 Wallace, 36) where it mentioned the right "to demand the care and protection of the federal government over his life, liberty and property when on the high seas, or within the jurisdiction of a foreign government; to peaceably assemble and petition for the redress of grievances, the privilege of habeas corpus; to use the navigable waters of the United States however they may penetrate the territory of the several states; all rights secured to citizens by treaties with foreign states . . . the right on his volition to become a citizen of any state of the United States by a *bona fide* residence therein, with the same rights as other citizens of that state."

[3] *Below*, Chapter XXVII.

must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance." [1]

Rights and duties.

Unhappily we hear far more about the rights of the citizen than we hear about his duties. The crook and the racketeer, when haled into court, demand all their rights under a constitution which they have set at defiance. Of course every right, of whatever sort, carries a duty along with it. The right to vote (if you insist on calling it a right) involves the duty to vote. The right to be protected carries with it the duty of helping to build up a government which is able to protect. A country worth having is a country worth serving. The right to sue in the courts carries with it the duty of abiding by their decisions. The right to share in the making of laws is conjoined with the duty of obeying the laws. Rights and duties are but two faces of the same shield.

Why duties need emphasis.

What, then, are the more obvious duties of the citizen? They are not set forth in the constitution, it is true, but they are implied in the very nature of free government. The citizens of a democracy who act upon the assumption that popular government prefigures rights alone will in time have no rights worthy of the name. Popular government implies not only government for the people but government by the people. It makes large demands in the way of patriotism, self-sacrifice, public spirit, intelligence, and activity. "Our forefathers," declared Pericles, "have long possessed this land and by their valor they made it free." But the forefathers of a people cannot *keep* a country free. Their descendants must do that, if it is to be done, by stressing their duties as well as their rights, by being willing to give as well as to take.

Proper performance of civic duties is essential to good government.

The Constitution of the United States, for example, guarantees to every citizen that he shall have the privilege of living under a "republican form of government." But this guarantee will mean much or little as each living generation chooses to make it. A government may be republican in form and yet be very bad government, inefficient, oppressive, and corrupt. All the governments of Central and South America are republican in form, yet some of them are nothing but guerilla dictatorships with military juntas able to seize power at an hour's notice. Dictatorships in Germany, Austria, Poland, and elsewhere are also masquerading in the garb

[1] Adkins *v.* Children's Hospital, 261 U. S. 525 (1923).

of republicanism. A republican form of government will preserve the blessings of liberty to such extent as its citizens entitle themselves by the intelligent and loyal performance of their civic duties.

A parable and its lesson.

Every American citizen, Gentile or Jew, ought to read and ponder the parable of Jotham in the Old Testament. It is the oldest, and one of the best parables in the literature of democracy. "The trees went forth on a time to anoint a king over them; and they said unto the olive tree, Reign thou over us." But the olive tree replied, as many a professedly good citizen has done when asked to take public office: "Why should I leave my sunny slope, and the fatness of my soil, to be promoted over the rest of you?" So they repaired to their second choice, the fig tree. "But the fig tree said unto them, Should I forsake my sweetness, and my good fruit, and go to be promoted over the trees?" And to the vine they went, with the same result. Presently, however, they came to the bramble bush with their invitation to rulership. And the bramble bush, true to type like a modern politician, quickly said: Sure, I'm the man you're looking for; just put your trust in my shadow. Whereupon he let fire come out of the bramble to devour the substance of the soil until even the cedars of Lebanon were consumed.[1]

When the olives, the fig trees, and the vines in the arboretum of a nation's citizenship disdain to do their duty, the bramblebushes of politics will step in and give any country, or any community, the kind of government it deserves. The excellences of a constitution avail little if the actual machinery of government be not based upon a sound sense of individual obligation. The world has never yet been able to construct a successful democracy on a foundation of popular indifference.

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[1] Judges, ix: 8–15.

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CHAPTER VIII

THE ELECTORATE AND THE SUFFRAGE

Suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the state itself.—*Thomas M. Cooley.*

Importance of accuracy in the use of terms.

The electorate is the sum total of the voters. It is made up of those who possess the suffrage. The terms *citizen* and *voter* are often used as though they meant the same thing, which of course they do not. All voters must be citizens, but not all citizens are voters. There are millions of young American citizens, for example, who do not qualify as voters because they are not yet twenty-one years of age. The voters comprise that portion of the adult citizenship which has been given the privilege of voting. All this, moreover, is not mere shadow-boxing with words. In political science, as in any other science, terms have a definite meaning. Where they are used inaccurately they promote confusion of thought. Loose terminology induces loose thinking.

Why the American suffrage is not uniform.

Neither in law nor in fact is there any rigid connection between citizenship and the right to vote. Citizenship is a federal matter. The national government determines, under the constitution, who shall be eligible for naturalization and how they shall be made citizens. But the national government does not give voting rights to anyone. It makes citizens, not voters. The states determine who shall vote, even at national elections. It is true, of course, that the states are not free to make any rules they please on this point; they are forbidden to deny the suffrage on certain grounds (namely, race, color, previous condition of servitude, or sex), and they must also (for congressional elections) establish the same suffrage requirements that exist for elections to the larger branch of the state legislatures. But even with these restrictions they have a good deal of discretion left them. They may allow aliens to vote and until recent years some of the states did so. It was not until 1925 that the last of these (Arkansas) abolished alien voting.

The states determine, moreover, the residence requirements for voting, the taxpaying requirements, and the educational qualifica-

The states control the suffrage.

tions if there are any. They could, if they so desired, provide that no one may vote at a presidential or congressional election unless he is able to recite the Declaration of Independence, or sing the high notes in the Star Spangled Banner, or go through the manual of arms. No state has done anything of this sort, of course, but all of them have set up various specific requirements for voting—such as a period of residence in the state, the payment of a poll tax, ability to read and write, or even the capacity to pass a mild intelligence test. That is why the requirements for voting at presidential elections are not uniform throughout the United States. A citizen may be a voter at a national election in Pennsylvania, when under exactly the same conditions he would not be permitted to vote at a national election in New York.

Suffrage in colonial days.

In the thirteen colonies before the American Revolution the privilege of voting was generally restricted to male property owners and taxpayers. The Declaration of Independence proclaimed that governments derived their powers from the consent of the governed; but the newly independent states did not carry this preachment into effect by widening the suffrage. They kept their varied requirements for voting. This situation created embarrassment for the constitutional convention of 1787 when it came to discuss the question as to who should vote at congressional elections. Gouverneur Morris of Pennsylvania wanted the national suffrage confined to owners of land; Oliver Ellsworth favored confining it to taxpayers, whether they owned land or not. "He who pays and is governed should be a voter," was his way of putting it.

The decision in 1787.

George Mason of Virginia was almost alone in advocating manhood suffrage, and he was one of those who refused to sign the constitution when it was finished. Benjamin Franklin, ever liberal in spirit, wanted it made certain that, whatever happened, "the common people" would have votes. James Madison favored some sort of property qualification although he realized the difficulty of fixing any uniform rule that would satisfy all the states. Finally, someone raised the question: Why not let each state settle the matter for itself? Those who are given the right to vote in each state, let them automatically become national voters. This seemed to be a good solution and it was adopted without a dissenting voice.

With the matter left to the various states, the drift to a more liberal suffrage began soon after the constitution went into effect.

A gradual extension after 1787.

But for the first twenty years the opposition was strong and the progress slow. The anti-suffragists of those days put up a stiff fight against the "vulgarization of politics" as they called it, and even so able a jurist as Chancellor Kent predicted that "the extension of voting rights to all white men on equal terms would end in the ruin of government and in universal calamity." But after the War of 1812 the movement for a widened suffrage gained new impetus and all but six states had abolished their property qualifications by 1820.

The spread of manhood suffrage.

A further enlargement of the voters' lists came during the period 1820–1840. It was part of the Jacksonian movement and surged out of the West. Settlers were wanted there and manhood suffrage was held out as an allurement. Conditions of life in frontier regions, moreover, favored the spread of equalitarian ideas. A man is a man on the frontier if he can survive the struggle for existence. And he is as good as any other man. The new western communities, therefore, gave every man a vote, and every voter a right to hold office. Some of them, indeed, extended the suffrage to aliens as well as citizens. This equalizing movement, moreover, did not confine itself to the new West. It backwashed across the Alleghenies to the older states and stamped its imprint there. In one state after another, North and South, the suffrage was liberalized by the abolition of property qualifications, tax requirements, and religious tests. By the close of Jackson's second term, in 1837, manhood suffrage had been adopted by all the states but three, and these joined the procession later.

The suffrage in 1832 and 1932 compared.

Democracy has now become so closely associated with universal suffrage that we wonder how men who were filled with the Spirit of 1776 could deny voting rights to three quarters of the adult population and yet call their government a democracy. But such was the case. At the presidential election of 1832, half a century after the Declaration, less than a million-and-a-quarter votes were polled in a population of more than twelve and a half millions—or about ten per cent. At the election of 1932, a century later, the polled vote was nearly thirty per cent of the population.

The negro suffrage problem.

Manhood suffrage, as most of the states understood it in early days, did not include the negro. Except in a few New England states colored citizens were everywhere excluded from voting. Nor was there any general demand for an extension of the suffrage to the negro until after the Civil War. Then arose the question

whether it should be guaranteed to the freedmen. Congress, by the reconstruction act of 1867, imposed negro suffrage upon the states of the former Confederacy and three years later the fifteenth amendment forbade the denial of voting rights to any citizen, by any state, on grounds of "race, color, or previous condition of servitude."

The fifteenth amendment.

To enact such a prohibition, however, proved easier than to enforce it. For a time the national government applied coercion to the southern states but this policy proved effective only so long as federal troops were on hand to make it so. Since 1877, when the troops were withdrawn, the southern states have successfully managed to evade, circumvent, and render largely innocuous the provisions of the fifteenth amendment. At first they did it by Ku-Klux methods, intimidating the negro into abstention from the polls. But there developed among the white population of the South a feeling that these rough-handed methods could not go on forever and that the actual disfranchisement of the negro ought to be "legalized." How to do this, and still keep from colliding with the federal authorities, has given them some trouble; but they have managed it. The artifices which they have used to disfranchise the negro are interesting, and a few of them ought to be briefly described, if only for the purpose of showing how the law of the land gives way before a strong public sentiment.

It has not been effective.

In the first place it will be observed that the fifteenth amendment does not forbid the denial of voting rights to illiterate persons. And since large numbers of negroes are unable to read and write intelligibly, this loophole seemed to offer the most practicable avenue of negro disfranchisement. A literacy test would shut out the great majority of colored citizens in the rural areas of the South. But the southern states also contain many white persons who are unable to read and write, hence the problem became one of keeping the illiterate negro out while letting his illiterate white neighbor in.

Methods of evading it.

Mississippi led the way to a solution of this problem in 1890 by establishing, among other qualifications for voting, the requirement that every voter must be able to read any section of the state constitution, or, as an alternative "give a reasonable interpretation thereof." It was assumed that any white voter, even though illiterate, would prove himself able to expound the constitution to the satisfaction of the registrars, they being always his own color.

The literacy test and the "reasonable interpretation" alternative.

But the illiterate colored man who sets out to give these white officials a "reasonable interpretation" of various technical clauses in the constitution, such as those which provide that "the privilege of the writ of habeas corpus shall not be suspended except in time of national emergency," and that "no attainder of treason shall work corruption of blood,"—well, the humor of such a situation can be left to the imagination of anyone who knows the Southland.

Upheld by the Supreme Court.

The Supreme Court of the United States, when called upon to decide whether this provision was a breach of the fifteenth amendment, ruled that it did not, on its face, "deny or abridge the suffrage of any citizen to vote on account of race, color or previous condition of servitude." [1] In this decision the court seems to have placed more stress on the exact wording of the amendment than on the intent of those who framed it or the methods of those who enforced it. Its action is hard to reconcile with the sound doctrine which the court enunciated in another case involving racial intolerance, when it asserted that "though a law be fair on its face" this would not avail if it were being applied with "an evil eye and an unequal hand." [2]

The grandfather clause.

But the Mississippi plan proved to be imperfect, in spite of its constitutionality, for it did not get all the illiterate whites on the lists. There were some who proved unable to give a reasonable interpretation of anything to anybody. So the solons of Dixie turned to that handy refuge of many a shiftless man—his honest ancestors. Accordingly the Louisiana constitution of 1898 provided that no one should be registered as a voter unless (1) he could read and write, or (2) owned at least $300 worth of property, or (3) unless he himself, or his father, or his grandfather had the right to vote on or before January 1, 1867.[3] The last alternative, which let in every white citizen but kept out every colored one, came to be known throughout the country as "the grandfather clause." Other southern states realized its value and soon put it in their suffrage laws.

Declared unconstitutional.

But the grandfather clause was a little too much for the gowned gentlemen who sit on the supreme bench at Washington. When the issue finally got before them they ruled that grandfather clauses were an evasion of the fifteenth amendment and hence

[1] Williams *v.* Mississippi, 170 U. S. 213 (1898).

[2] In the case of Yick Wo *v.* Hopkins, 118 U. S. 356.

[3] This was the date of the earliest act of Congress granting suffrage to the negroes in the southern states.

unconstitutional.[1] "It is true," said the court in this decision, "that it (the grandfather clause) contains no express words of an exclusion, from the standard which it establishes, of any person on account of race, color, or previous condition of servitude . . . but the standard itself inherently brings that condition into existence." By the time this decision was rendered, however, the clause had accomplished the major part of its purpose, for it had put all illiterate white citizens, over twenty-one years of age, on the voting lists. All that then became necessary was to provide by law that any man's name, once on the list, should stay there.

Exclusion of negroes from the primaries.

There is another way of permitting negroes to be registered as voters but nevertheless depriving them of all share in the selection of congressmen. This is made possible by the system of party organization. Practically all the southern states are overwhelmingly Democratic. The candidates who receive the nomination at the primary elections of that political party are certain to win at the polls, hence the real fight is for the nomination. So Texas in 1923 adopted the expedient of providing that no negro should be qualified to participate in a Democratic primary and that any ballot cast by a negro at such primary should be thrown out. But here again the Supreme Court intervened and held the Texas provision unconstitutional as denying to negroes "equal protection of the laws." [2] Thereupon the Texas legislature changed the laws to provide that the state executive committee of each political party should have power to prescribe the qualifications of the party's own members, and thus to control eligibility at the primaries. By this means negroes were again excluded, and once more the Supreme Court intervened to enforce "the equal protection" clause of the constitution.[3] It is possible, of course, that the exclusion can be made effective by party regulations even though the statutes relating to it are unconstitutional.

Other methods of keeping negroes from the polls.

Moreover, if worst comes to worst, the colored citizen can be registered as a voter at both primaries and elections but actually debarred from appearing at either. He can be required to produce his poll tax receipt (which he has lost or forgotten); he can be required to prove that he was never convicted of any offense, even petty theft; he can be bullied by the polling officials; he can be

[1] Guinn *v.* United States, 238 U. S. 347 (1914), and Myers *v.* Anderson, 238 U. S. 368 (1914).

[2] Nixon *v.* Herndon, 273 U. S. 536 (1927).

[3] Nixon *v.* Condon, 286 U. S. 73 (1932).

warned to keep away—and he will usually do it. The number of negroes who actually vote in the southern states is relatively small except where their votes are requisitioned to decide a factional fight within the party. The white population of the South is determined that the proportion shall stay this way. This applies to both parties, Republicans as well as Democrats.

The present situation.

As for the negroes themselves, most of them do not care whether they vote or not. When the negro wage-earner or small farmer realizes that in order to vote he must pay a two-dollar poll tax he begins to lose interest in the idea. The whole question would soon cease to engender bitterness were it not periodically stirred up by the negro's crusading friends among northern white folk. The fundamental error was made, two generations ago, when the victorious northern states insisted on absolute political equality for the two races, thus creating in the South a situation that was bound to prove intolerable. The fifteenth amendment was adopted at a time when emotion rather than cool judgment controlled the mind of the nation.

Effect on the basis of representation.

The framers of the fourteenth amendment foresaw that the white population of the South might attempt to exclude colored citizens from voting and they provided Congress with a simple method of penalizing any state that should do this. Here is the provision:

> "But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

Has not been made operative.

The stipulation, be it noted, is that the basis of representation "shall be reduced," but it never has been. Congress alone has power to enact the reduction, and Congress has never been ready to do it, although measures in that direction have been brought in from time to time. Southern congressmen have argued (and if you read the above provision carefully you may agree with them), that if the basis of representation is reduced by reason of negro exclusion in the South, it should also be reduced in those northern

states which exclude thousands of citizens from voting because they cannot read and write, or because they do not pay a poll tax, or because they cannot pass an intelligence test—as in New York State. The question is an academic rather than a practical one for there is no likelihood that Congress will reduce the quota of representation from either section of the country.

The issue of woman suffrage.

It is significant that of the nine amendments which have been added to the Constitution of the United States during the past hundred years, three deal with suffrage (the fourteenth, fifteenth, and nineteenth), all of them by way of prohibiting or penalizing its denial on specified grounds. The nineteenth amendment, which became effective in 1920, resulted from an agitation which went on with varying degrees of intensity for over a hundred years. The right of women to the ballot is sometimes said to be a natural right, and deducible from the fundamental principles of American government. If so, it took the American people a very long time to recognize the fundamental principles in this case. As a matter of fact they looked upon the issue as one of expediency, not of principle. They were reluctant to double the electorate until they could be convinced that some good would come of it.

Beginnings and progress of the movement.

The agitation for woman suffrage began in the reign of Andrew Jackson, or even earlier. Prior to the Civil War it made no headway, for legislators could not be brought to take it seriously. The agitation for "woman's rights" merely furnished the theme of perennial jokes, cartoons, and humorous ditties. But after the Civil War the movement began to make some progress. Manhood suffrage had been won; the negroes had been technically enfranchised; hence the two older burning issues were out of the way. The arena was clear for a new suffrage battle and it was soon in progress. In 1869 the advocates of votes for women won their first skirmish in the territory of Wyoming when they were given the suffrage at territorial elections and the privilege was continued when the territory became a state in 1890. During the next ten years Colorado, Idaho, and Utah also chalked up as states which enfranchised women on the same terms as men. Other states did likewise, one by one, during the next two decades until in 1915 there were about a dozen of them in all.

The nineteenth amendment.

But the leaders of the movement lost patience with the slow process of winning the states one by one. They wanted nation-wide enfranchisement and wanted it quickly. Hence they turned

their energy to a constitutional amendment which had been slumbering for many years in the files at Washington.[1] Congress responded to their pressure in 1919, passed the proposed amendment by a two-thirds vote in both Houses, and sent it to the states for ratification. The necessary three fourths of the states ratified it as the nineteenth amendment in a little more than a year, thus putting it into effect in time for the national election of 1920.

Results of woman suffrage.

This is hardly the place to recapitulate the arguments for and against woman suffrage which were poured into the ears of the American people for a century or more. The issue is now settled—probably settled for good, and doubtless settled right. We have had sixteen years of sex equality at the polls, with four presidential and eight congressional elections in that time. What the result has been there is no way of determining, for the ballots cast by men and women are not kept separate. Yet there is little reason to think, from the superficial indications, that the extension of the suffrage to women has made any substantial change in the quality of the electorate, whether for good or ill. It has doubled the voting lists throughout the country, thus making the registration of the voters and the holding of elections more expensive. Candidates now have to reach twice as many voters with their propaganda, and a double strain has been put upon the electoral machinery.

Women vote as men do.

On the other hand, the nineteenth amendment has made twice as many people contented with their electoral status, and has removed an irrelevant issue from American politics. Sex has no more right to be an issue in politics than has race, or color, or religion. The extension of the suffrage to women has undoubtedly developed among them a more vital interest in public affairs. Despite all predictions to the contrary women seem to be interested in politics and are gradually becoming more so. On the whole they are using the ballot as men have used it,—with about as much intelligence or lack of it as the case may be. They appear to be susceptible to the same influences, both good and bad. Like their husbands and brothers, some women vote regularly and vote with discrimination, while others go shopping on election day or vote for whichsoever candidate makes the most alluring promises. Some are unbossed in their own homes but well bossed by a ward leader, or perhaps by a clergyman who finds political parables in

[1] Known as the Susan B. Anthony amendment. It was first proposed in 1869.

his gospel texts. Some are wise serpents and some are harmless doves, even as male voters have always been.

Their attitude on moral issues.

Woman suffrage has worked no revolution in American politics. No one should have expected it to do so. It has not put the bosses to flight or shattered the rings, or made the politicians walk in the straight and narrow way. Neither has it, on the other hand, softened the masculinity of New World politics, or substituted government by the heart for government by the head. Women voters are perhaps somewhat more responsive to their emotions than men are. They are more easily aroused on moral issues, although it should be noted that the nineteenth amendment did not suffice to protect the eighteenth, as many good people expected it to do.

The question of a general literacy test.

Controversies as to who shall have the privilege of voting are not yet at an end. The question of debarring illiterates, of whatever sex or color, is having much discussion and is likely to have more. Eighteen states now apply a literacy test. Of these some require that voters shall be able to read; while others insist that they shall be able both to read and write. The test is usually given by the registrar of voters or election board and hence is often a perfunctory affair. Administered by these bipartisan officials it does not shut out most of those who ought to be excluded. It fails to exclude large numbers of applicants who can barely write their own names and who have great difficulty in reading, much less understanding, simple paragraphs in any newspaper.

The New York plan.

New York State, in 1923, inaugurated a new type of literacy requirement, one which virtually operates as a mild form of intelligence test. The requirement is that every new voter who cannot present a certificate of graduation from the eighth grade of an elementary school in which English is the language of instruction (or from a higher school) must pass a literacy test *administered by the school authorities*, not by the election officials.[1] This test is given by the local school superintendents, but it is uniform throughout the state. It consists of a paragraph of simple English (about 100 words) which each applicant is first required to read. He must then answer in writing six or eight easy questions based upon the paragraph. In 1932 nearly 150,000 new voters took the literacy test, and of these about 11,000 or more than seven per cent failed to pass it.

[1] Persons who have attended an evening school and completed a prescribed amount of work are given a certificate of literacy without taking the test.

The argument for and against it.

The adoption of anything in the way of a stringent literacy test is always opposed by the practical politicians. They argue that political interest is not related to education. They point out that men who can neither read nor write are required to pay taxes, to serve in the army during war, and to perform other civic obligations. But the real question is whether the giving of the ballot to illiterates is good for the community as a whole, and to that question there can be but one answer. Giving the ballot to anyone who cannot read or understand it is surely not in the public interest. This is particularly true in communities which use the initiative and referendum, thus submitting a long list of complicated questions to the decision of the voters.

For, when you reflect upon it, the ballot is potentially the most dangerous weapon that can be placed in the hands of any man. As an instrument for doing damage on a nation-wide scale, when unwisely used, there is nothing that compares with it. And its capacity for harm is obviously increased when placed in the hands of men who do not know what they are voting for or against. Literacy is not a luxury in America, with free day schools for children and free evening schools for adults. No alien who cannot read and write is eligible to be naturalized. No illiterate, in most states, is allowed to serve on a jury. It has now become virtually impossible for anyone to obtain or hold a job above that of a common laborer unless he can read and write. All these things considered, the literacy requirement for voting does not seem to be an unreasonable one.

The increasing difficulty of intelligent voting.

The problems of government are becoming steadily more complicated. In every generation they grow more difficult for the average man to comprehend. Run through the pages of the *Congressional Record* for any session of Congress. You will find discussions relating to deficiency appropriations, rediscount rates, railroad differentials, flexible tariff schedules, naval ratios, immigration quotas, credit inflation, agricultural adjustment and farm loans, collective bargaining, dollar devaluation, stabilization of exchange, equalization funds, old age pensions, unemployment insurance, public utility regulation, the guarantee of bank deposits, and many other topics of equal complexity. It may be doubted whether one American citizen in five has any clear comprehension of what these expressions imply. Certainly not one in a hundred understands them in all their implications. The average

voter is busy. When he is not busy he is tired. When he is not tired he is worried. In his spare hours he reads the sports section of the newspaper, listens to the radio, or goes to the movies—from none of which does he get much enlightenment on the real merits of public issues.

Will the suffrage be again restricted?

The suffrage, in due course, will doubtless be adapted to these newer complexities of our political and economic life. It has passed through three stages—property qualifications, manhood suffrage, and universal suffrage. This last stage marked an ultimate boundary in the way of expansion. We can inflate the electorate no further. But since institutions never stand still it is not improbable that the next development will be in the direction of narrowing the suffrage. New York has pointed the course which this contraction may well take, namely, the imposition of a real literacy test administered by the school authorities. Then, step by step, it may be possible to raise the standard to a point where no one will get his name on the voters' list unless he can demonstrate a capacity to understand at least the simpler issues that are placed before him.

Tax qualifications for voting.

Many states still maintain a tax qualification for voting. In some of them every male voter must have paid a poll tax or at least must show that he has been assessed for it. The usual argument for imposing a tax qualification is that nobody should have a voice in spending public funds unless he has made some contribution. For unless the voter realizes that he is helping to bear the burden of government, it is argued, he will not use the ballot with a proper sense of responsibility. But this argument assumes that the only people who realize that they pay taxes are the ones who pay directly. What about the *indirect* taxpayer? He who pays rent, pays taxes. He who buys goods, pays taxes. Every grocery bill, doctor's bill, or gas bill is a tax bill in part. For a portion of it goes to pay the taxes which are levied on grocers, doctors, gas companies, and all such. There is no real basis for a sharp distinction between taxpayers and non-taxpayers. Those whom we call taxpayers are only middlemen for the rest of us. Not every voter realizes this, but many of them are learning to do so.

Citizenship, age, and residence.

None but American citizens are now permitted to vote in any part of the United States. The minimum voting age is twenty-one for men and women alike. All the states prescribe a certain minimum requirement of legal residence, ranging from three months

to two years. Sometimes there is a double requirement, such as three months in the city and a year in the state. Legal residence, however, does not necessarily involve actual residence. One may be a legal resident of a state or city while actually living, perhaps for several years, somewhere else. Former President Hoover was (and still is) a legal resident of Palo Alto, California, and remained a registered voter there, although for thirty years he spent the major portion of his time elsewhere—in Australia, South Africa, Belgium, and Washington. A voter's legal residence is where he claims his home, a place from which, when going, he goes, and to which, when coming, he comes. But it is not necessarily the place at which he stays.

Disqualifications.

There are certain disqualifications which also ought to have mention. These include conviction for certain serious crimes. Election frauds are sometimes penalized by permanently disfranchising those convicted of them. Some states debar from voting all soldiers, sailors, and marines in the active service of the national government. Insane persons and those confined in certain public institutions of incarceration are also barred. Legal residents of the District of Columbia are not disqualified from voting but they never get an opportunity to vote because no elections are ever held in the District. Washington has no presidential electors, senators, representatives in Congress, governor, assemblymen, mayor, or councillors. It is ruled by three appointive commissioners.[1]

Summary.

Hence when someone says that "everybody has the right to vote in the United States" the statement needs large reservations. To be even measurably accurate he should say that in the United States a person usually has the right to vote if he or she is (a) a citizen, (b) twenty-one years of age or over, (c) a legal resident in a given state and locality for a prescribed length of time, (d) able to read and write, (e) a taxpayer, where so required, (f) not disqualified in any way, and (g) forehanded enough to get registered in time. These various requirements, taking them together, shut out at least ten million adult inhabitants of the United States.

Registration of voters.

No one is registered as a voter for national elections. Each state makes provision for the enrollment of voters, and these lists are used at the national and state elections alike. Each state performs the work of registering voters according to its own

[1] See *below*, Chapter XXVIII.

methods and these methods vary a good deal throughout the country. The national government has no control over them. On the other hand Congress has the right to judge the qualifications of its own members, hence if a senator or representative appears to have been chosen through the wrongful inclusion or exclusion of names on the voters' lists he can be denied a seat. This, in a roundabout way, gives Congress a means of insisting upon fair play in the registration of voters. National officers may also be assigned to guard the polls at congressional or presidential elections and may arrest persons who try to vote illegally, bringing them for trial before a federal judge.

The slacker vote.

People in general are much more insistent on having the suffrage than on exercising it. Threaten to take a man's voting privilege away, and he will fight to retain it. But give it to him gladly and he will often tuck it away in moth balls. There are millions of eligible voters who never register, and millions more who register but do not go to the polls. The eligibles in the United States (excluding southern negroes) must exceed sixty millions. Of these less than fifty millions are registered. Of the total registration less than forty millions voted at the Roosevelt-Hoover presidential election of 1932 although this contest roused the electorate to a fever heat. In state and local elections the polled vote does not usually exceed fifty to sixty per cent of the registration.[1] Some years ago there was a feeling that the situation might be improved by permitting absent voting, that is, by allowing voters whose business takes them away from home on election day to vote before they go, or to send their ballots by mail. Absent voting is now permitted in forty-four states but the results have not been up to expectations. Relatively few voters take advantage of the opportunity.

Compulsory voting.

Various other remedies for non-voting have been proposed. Compulsory voting has been advocated but does not exist anywhere in the United States. In some other countries the procedure is to impose a small fine upon every voter who, without valid excuse, stays away from the polls on election day, or, for repeated absences, to strike his name from the voters' list altogether. But such measures have not proved to be generally effective. In some cases the compulsion has merely availed to increase the number of

[1] For an analysis of the reasons see C. E. Merriam and H. F. Gosnell, *Non-Voting: Causes and Methods of Control* (Chicago, 1924).

blank ballots which voters drop in the box. In any event the voter who goes to the polls because he will be fined if he stays away is not likely to mark his ballot with much intelligence or discrimination. Are such votes really worth counting? Voting is a duty to be sure, but it is a duty which ought to be performed from motives of civic responsibility, not from fear of the penalties. Most citizens do not have to be forced to the polls, and it is questionable whether forcing others there would serve a useful purpose.

Why voters stay away.

People do not become good citizens by going to the polls. They go to the polls because they are good citizens. They go when and because they are interested. They stay away because they have no interest, or too little interest, in the issues or the candidates. And when one reflects upon the kind of issues and candidates that are so often presented to them, this lack of popular interest is hardly a matter for surprise. Many voters remain befogged, confused, bewildered, because that is what the politicians sometimes intend them to be. Voting is not an end in itself. To vote unintelligently is worse than not to vote at all.

Remedies for non-voting.

Energies ought therefore to be concentrated upon the task of clarifying the issues, vitalizing the party system, and improving the quality of the candidates as a means of getting the people interested, informed, and aroused between elections. Registration should be made less irksome, the ballot simpler (with provision for the representation of minorities), elections less frequent, party cleavages more distinct and vital, and party programs less evasive. Above all, our campaigns of civic education should be more comprehensive, more persistent, and more effective in reaching those sections of the electorate which are most in need of sound information. Too many such campaigns begin and end in circles where the need is least—among business and professional organizations, in women's clubs, in the editorial columns of newspapers, and over the radio at hours when most voters are at work. Enterprises in civic education should be carried to the factory gates and into the workers' homes. They should be dramatized to catch the imagination of those whom the gospel is intended to reach.

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CHAPTER IX

POLITICAL PARTIES: HISTORY AND FUNCTIONS

Like other institutions, the political party is in constant process of reconstruction, and must justify itself to each succeeding generation.—*Charles E. Merriam.*

Parties began with human nature.

All popular government is party government. There has never been at any time in the world's history a free government in which political parties did not arise and function. Political parties existed even in ancient republics and mediaeval cities. There were Lancastrians and Yorkists, Cavaliers and Roundheads in England long before the American Revolution. There were Whigs and Tories in the thirteen colonies. These divisions were commonly called "factions" and they sometimes settled issues by breaking heads rather than by counting them. But they were the ancestors of our political parties at the present day. It is merely that the older factions have adapted their methods to the newer era of law and order.

Opposition of the Fathers to the party system.

The men who framed the Constitution of the United States were not believers in party government. On the contrary they sought to provide a scheme of government which would be free from partisan rivalry or the "violence of faction" as Madison called it:

> "Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. . . . The latent causes of faction are sown in the nature of men; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government and other points . . .; an attachment to different leaders . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to coöperate for their common good." [1]

[1] *The Federalist*, No. 10.

It was Madison's idea that the right form of government would provide its own momentum. He and his associates believed that a properly adjusted system of checks and balances would keep any faction or party from ever gaining control of the country's affairs. So they ignored political parties altogether, making no mention of them in the constitution. But everyone now realizes that a constitution is not a government. It has no energy of its own, but must be propelled into action by power supplied from somewhere else. This motive power is furnished by representatives whom the voters elect, and the voters in turn have to be guided to this action by some kind of organization. Give people the right to govern themselves, to choose their own representatives, and to speak their minds aloud—do this and political parties will develop, no matter what the constitution may intend. It has been so in America. The stone which the builders rejected has become the chief cornerstone.

Washington's antipathy to "the spirit of party."

It is true that for a short time after 1787 no regular political parties made their appearance in the United States. Washington's election was unanimous on both occasions. But he seemed to discern indications that "the spirit of party" was rearing its sinister head and in his farewell address tried to put his people on their guard against such a danger. This address was as much an admonition against party divisions within the Union as against permanent alliances outside. "In the most solemn manner" he warned the nation "against the baleful effects of the spirit of party generally," and declared that it had no place in "governments purely elective." His admcnition was so earnest that it deserves inclusion here:

> "I have already intimated to you the danger of parties in the state, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baleful effects of the spirit of party generally. . . . It serves always to distract the public councils, and enfeebles the public administration. It agitates the community with ill-founded jealousies and false alarms, kindles the animosity of one part against another, foments occasional riot and insurrection. . . . There is an opinion that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This within certain limits is probably true—and in governments of a monarchical cast, patriotism may look with indulgence, if not with favour, upon the spirit of party. But in those of the popular character, in governments purely elective, it is a spirit not to be en-

couraged. . . . A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest instead of warming it should consume." [1]

The beginnings of American political parties.

But it was futile for the oracle of Mount Vernon to inveigh against manifest destiny. Party divisions were bound to arise; indeed, they had already arisen. The members of the constitutional convention voted on party lines although they did not always realize it. Alexander Hamilton and Luther Martin, Edmund Randolph and William Paterson were quite as partisan in the convention as Andrew Jackson and John Quincy Adams were forty years later. From the outset of their deliberations the delegates divided themselves broadly into two groups on questions of general policy.

There were party-groups even in the constitutional convention.

There were those who believed in a real union, who wanted to make the states subordinate to the nation and to bestow large powers upon the central government. These were the Federalists. On the other hand there was a strong minority of the delegates who desired that no power should go to the central government if it could possibly be left to the states. These were the Anti-Federalists.

The Federalists and Anti-Federalists.

These two groups revealed their antagonisms more clearly during the contest for ratification. The Federalists supported the new constitution in the various state conventions while the Anti-Federalists opposed it. But the line of demarcation between the two was not yet a rigid one and with the adoption of the constitution the Anti-Federalist opposition subsided. Washington, when he formed his first administration in 1789, tried to complete the healing of the breach by taking into his cabinet the two outstanding leaders of diverging political thought, Thomas Jefferson as secretary of state and Alexander Hamilton as secretary of the treasury.[2] For the rest, however, Washington chose most of his appointees from the Federalist ranks.

The Federalists in the saddle (1789–1800).

Thus the Federalists were in control, although they disclaimed the idea of partisan government. The country as a whole rallied to the new administration, partly because people wanted it given a fair chance and partly because the weaknesses of the old confederation were still quite alive in the minds of everyone. The excesses of the French Revolution (1789–1802) likewise disgusted

[1] *The Writings of Washington*, edited by L. B. Evans (New York, 1908), p. 539.

[2] For the interesting story of the rivalry between these two notable statesmen see Claude G. Bowers, *Jefferson and Hamilton* (Boston, 1925).

public opinion in America and led the voters to place more emphasis on internal order and national defense than upon the natural liberties of states or individuals. Washington was not a party man, nevertheless he gravitated steadily towards the Federalist point of view.

Their policy arouses opposition.

The activities of the new federal government, more particularly the work of Alexander Hamilton, aroused a good deal of opposition. To the farmers and frontiersmen Hamilton's new deal looked like a surrender to the moneyed and shipping interests. Jefferson, whose lack of sympathy with Hamilton was not concealed even while he was a member of the same cabinet, presently came to be recognized as the champion of the opposition, and his followers began to be called Democratic-Republicans.[1]

Their disunion under Adams.

Then the administration of John Adams gave Jefferson and his followers a chance to make rapid headway. Hamilton and Adams could not work in harmony, for the two were altogether unlike in temperament and ways. Hence their relations soon ended in an open breach and this dissension weakened the party. By their support of the alien and sedition acts (1798), moreover, the Federalists committed a serious error, giving Jefferson and his friends an opportunity to make political capital. Resentment against this legislation was so strong that every prosecution under the alien and sedition acts provided the occasion for a popular demonstration against the Federalists. Meanwhile the factional strife within this party became more bitter. At the election of 1800, therefore, Jefferson was able to win the presidency and the Democratic-Republicans assumed control of the national government. Just before the close of his administration, however, Adams succeeded in clinching for many years the hold of the Federalists upon one department of the government, namely, the Supreme Court. This he did by appointing John Marshall to be chief justice.

The Jeffersonian victory of 1800.

The election of 1800 disclosed a clean-cut political alignment not only among the leaders but among the people. The agricultural population of the country, the back country grain growers, for the most part supported Jefferson. On the other hand the industrial and the trading interests of the seaboard fringe went chiefly to Adams. The change from Adams to Jefferson was, therefore, a

[1] Often they were called "Republicans." To use this term in speaking of them is not now essential, however, and is very confusing. Nothing could sound much stranger to the ear of the average American than to hear Thomas Jefferson spoken of as the founder of the "Republican" party.

turnover of great political significance. The Federalists had been conservative, aristocratic, even reactionary. They had clung to theories of government which placed more emphasis upon order than upon liberty. Jefferson and his Democratic-Republican followers, on the other hand, professed a philosophy of government which laid stress upon the natural rights of the citizen and the reserved powers of the states. While they reversed some of the Federalist policies after coming into office, they did not abandon any of the powers which the Federalists had acquired for the new government. They continued the protective tariff, established another United States bank, and in the purchase of the Louisiana Territory gave the broadest possible interpretation to the implied powers of the national government. The alien and sedition laws were allowed to lapse; but the embargo act, which shut off American commerce with Europe (1807), represented quite as great an interference with individual liberty as anything that the Federalists had done.

Supremacy of the Democratic-Republicans (1800–1824).

Nevertheless Jefferson remained strong in the confidence of the people, as his reëlection proved in 1804, and he was able to pass the presidency to his disciple, Madison, at the close of his second term in 1809. During the two administrations of Madison the Federalist party still further disintegrated, and at the election of 1820 placed no candidate before the people. With the reëlection of James Monroe in 1820 the Democratic-Republicans were in complete control, their candidate having carried every state in the Union.[1] The Federalist party went out of existence.

Disintegration of the Federalists.

But no single party can ever remain permanently in control of a free government. A political majority, no matter how strong, contains within itself the germs of disintegration. Signs of disunion showed themselves among the Democratic-Republicans, even before the celebration of their unparalleled victory was over. Then, before very long, the leaders found that they could not act together; so they went their several ways, each carrying a section of the party with him. Henry Clay, John C. Calhoun, William Crawford, Andrew Jackson, DeWitt Clinton, and John Quincy

The party chaos of 1824.

[1] One elector from New Hampshire gave his vote for John Quincy Adams for President, and thus deprived Monroe of the honor of a unanimous election. It has been frequently said that this recalcitrant elector did so in order to prevent anyone else from sharing with Washington the honor of a unanimous choice; but this statement is not true. The elector had other reasons for his action. See Edward Stanwood, *A History of the Presidency* (revised edition, 2 vols., Boston, 1928), Vol. I, p. 118.

Adams each had his following. Party politics, for a time, gave way to personal politics. It was for this reason that the people failed to give any presidential candidate a majority in 1824 and thus compelled the House to make the choice. The action of the House in electing John Quincy Adams instead of Andrew Jackson served to unite the various factions behind these two rival leaders, one group calling itself the National Republicans (later Whigs) and the other Democrats. The election campaign of 1828 was fought by these two parties and Jackson won.

The election of Jackson and the era of Democratic supremacy (1828–1840).

"The election of General Jackson to the presidency," says Edward Channing, "was the most important event in the history of the United States between the election of Jefferson in 1800 and that of Lincoln sixty years later." [1] Every president down to 1828 had come from Virginia or Massachusetts. Every one of them had been drawn from the Brahmin caste of American society. Even Jefferson and Madison, although holding liberal views, represented in their education and habits the courtly standards of the Virginia gentleman. Jackson, on the other hand, was a product of the new West. He embodied the spirit of the frontier. A fighter by instinct, his whole life had been spent in fights—against Indians, Englishmen, and reactionaries. After his election to the presidency he kept on fighting—with the bureaucracy, the bank, nullification, and the aristocratic spirit.

The election of Jackson, at any rate, is a great landmark in the history of American political parties. His views and policies were forceful; they made him warm friends and bitter enemies. Above all, they solidified the division of the people, a Right Wing and a Left Wing, into two parties, Whigs and Democrats.[2] Jackson's extension of the spoils system made his party organization stronger by giving it something tangible to fight for. Even more far-reaching in its effects upon the American party system was his successful fight to break up the congressional caucus as a mechanism for nominating presidential candidates, thus paving the way for the rise of the national party conventions.

The Democrats continued to hold power until 1841, having re-elected Jackson in 1832 and named Van Buren as his successor in 1836. Then commenced an era of party alternation in office. The

[1] *The United States, 1765–1865* (New York, 1896), p. 208.

[2] The Whig party was organized in 1834 by a combination of the National Republicans with one faction of former Democrats.

The alternations and reorganizations of the period 1840–1860.

issue of slavery came more and more to dominate the political arena, and in the end it split both the Whig and Democratic parties asunder. During the middle fifties a new Republican party arose from the ruins of the old Whig organization and clinched its position by securing the election of Lincoln over a divided opposition in 1860. This election ushered in a period of Republican supremacy which continued for twenty-four years, from 1861 to 1885.

The effect of the Civil War on party strength.

The Civil War, while it lasted, drew into the Republican ranks all those who believed in "the unconditional maintenance of the Union, the supremacy of the constitution, and the complete suppression of the existing rebellion with the cause thereof by all apt and efficient means." It was by appealing to the voters on this program that the Republicans reëlected Lincoln in 1864. When the war ended it left the Republican party strongly entrenched. Then came the difficult task of reconstruction which kept sectional bitterness alive, and it was not until the end of Grant's second term (1877) that the two great parties began to align themselves upon issues wholly unconnected with the Civil War.

Alliance of the Republicans with the business interests.

One of the legacies of the war was a high tariff, and the continuance of a protective policy during the seventies drew to the Republicans the support of the large business interests of the country. Questions of finance and currency also came to the front during this period and they were dealt with by Republicans in a way which drew support from those who believed in conservative legislation. The Democrats, on the other hand, made their appeal to the friends of tariff reduction, to the agricultural voters of the South, to those who had radical views on matters of finance and currency. Grant, Hayes, and Garfield successively carried the Republican standard to victory during these years when questions relating to the tariff and the currency were the great issues. It

The election of 1884.

was not until the election of 1884 that the Republican hold upon the presidency was relaxed. Even then, the triumph of Grover Cleveland was due to the weakness and indiscretions of the Republican candidate.

Recent party developments.

At each of the next four elections the tariff continued to be a prime issue, although the Democratic adoption of a free silver program in 1896 thrust the question of bimetallism into the foreground. The Democrats did not find this issue a winning one, and they dropped it from their platform. Until 1912, therefore, the cleavage between the two major parties remained tolerably clear,

and it related more directly to the tariff than to any other issue. In 1912, however, there came a schism in the Republican ranks, a revolt against the alleged reactionary methods and tendencies of its leaders, with the resulting formation of the short-lived Progressive party. This division in the Republican ranks made certain the success of the Democrats and the election of Woodrow Wilson for his first term. By 1916 the breach had been somewhat healed, but a new issue had now thrust itself upon the political scene. The tariff dropped out of public discussion and there were no currency questions in dispute. The relation of the United States to the Great War which for two years had been raging in Europe was the chief issue in the minds of the people. President Wilson was reëlected by the votes of those who appreciated his endeavors to keep the country out of war, but no sooner had he been inaugurated for his second term than circumstances forced America into the great conflict.

The League of Nations issue.

The World War came to an end in 1918 and President Wilson went to Europe to help arrange a treaty of peace. Included in this treaty he brought home a covenant for a League of Nations and submitted these combined documents to the Senate for ratification. The Democratic party, through the President's action, found itself committed to the League; while the Republicans opposed America's adhesion to it. The treaty and covenant failed in the Senate, whereupon this issue (along with various others) went to the people at the presidential election of 1920. The result was a Republican victory and a consequent relegation of the League issue to the background. President Harding, who took office in 1921, died before the end of his term and was succeeded by Calvin Coolidge who had been elected with him as Vice President. The latter won the election of 1924 and four years later the Republicans, aided by the general prosperity of the country, were once more victorious.[1]

The great depression and its political effects.

At this election of 1928 they elected President Hoover by the largest majority that had been given to any candidate for more than a century. But President Hoover did not prove to be a favored son of fortune. The country after its long session of abnormal economic prosperity was heading into a severe business

[1] A more extended account of party evolution may be found in Samuel P. Orth and R. E. Cushman, *American National Government* (New York, 1931) pp. 165–214. See also Frank R. Kent, *The Democratic Party: A History* (New York, 1928), and W. S. Myers, *The Republican Party: A History* (revised edition, New York, 1931).

depression. During the entire four years of the Hoover administration this situation grew steadily worse, hence the people were quite responsive to the promise of a "new deal" which the Democratic platform held out to them in the campaign of 1932. On this platform Franklin Roosevelt was elected by a very large majority, carrying Democratic control of Congress along with him. Far-reaching projects of legislation were at once brought forward and most of these were rapidly enacted into law. This new deal program has served to break down the old party lines to a considerable extent, both in Congress and outside. Whether they will be easily restored is a question that only the future can decide.

Minor parties: the Prohibition party.

Throughout the past seventy-five years the Democrats and Republicans have held their place as the two major parties. But minor parties have come into the field from time to time, and there are two of these which deserve mention in even the briefest outline of American political history. One is the Prohibition party, which held its first national convention in 1872. Its fundamental principle, as its name implies, is opposition to the manufacture, importation, and sale of intoxicating liquors, but the party platform has usually expressed itself on various other issues as well. Until 1920 its main purpose was to secure the enactment of prohibition; then for a dozen years its energies were devoted to the difficult task of securing a strict enforcement of the eighteenth amendment. And since the repeal of this amendment the Prohibition party has been girding up its loins for a renewal of the fight. Doubtless it will devote most of its energies to the reënactment of prohibition in the several states, one by one.

The Socialist party.

The Socialist party in the United States began its career as a national organization about forty years ago, but for some time previously there had been a Socialist-Labor and a Socialist-Democratic party. The Socialist party of today is the result of a partial union of these two earlier organizations.[1] Its platform calls for both economic and political reforms. Among the economic demands are the public ownership of railroads, telegraphs and telephones, the extension of state ownership to mines, forests, and other natural resources, the socialization of industry, the provision of work for the unemployed, and the establishment of social insurance, includ-

Its platform.

[1] Not all the members of the Socialist-Labor party went into this union. So it continues in existence and sometimes puts candidates in the field, but they poll a very small vote.

ing unemployment insurance and old age pensions. Among political reforms the Socialist party demands the initiative and referendum on a nation-wide scale, the abolition of the United States Senate, the popular election of federal judges for short terms, and the termination of the Supreme Court's power to declare laws unconstitutional. At the presidential election of 1932 the Socialist candidate for the presidency was supported by nearly three quarters of a million voters, but did not obtain a single representative in the electoral college.

The Farmer-Labor party and the Communists.

In 1920 a Farmer-Labor party arose in the northwestern states. For a time it made considerable headway but it never really embodied an alliance of the two groups whose names it linked together. Its leadership, moreover, passed into socialist hands and eventually one faction split off to join the Communist party. This last-named group became more active with the progress of the economic depression. It is affiliated with the *Third Internationale* which has its headquarters in Moscow and advocates the establishment of a proletarian dictatorship on the Russian model. Its candidates have been put forward at various elections but have never received a substantial vote although supported by vigorous propaganda.

Other minor parties.

Other minor parties have arisen periodically in American politics, and they will doubtless continue to arise in the future. Students of American history will readily recall the Anti-Masonic party, the Know-Nothing party, and so on. Sometimes such parties develop great strength within a few years, but almost as quickly lose it again. The history of the Populist party (1890–1896), and of the Progressive party (1912–1916), afford good illustrations. Englishmen often ask, and Americans find it hard to explain, why there is no strong Labor party in the United States. The formation of such a party has frequently been urged at meetings of the American Federation of Labor but has never received the endorsement of this organization. The Federation has preferred to gain its ends by putting pressure upon the two major political parties. In England the Labor party contains a large number of voters who are not members of labor unions; the American Federation of Labor has no such element.

Party Functions

Political parties are groups of voters whose aim is to promote the success of public policies in which they believe. Hence political

The psychology of parties.

parties are a natural outcome of the fact that all people do not think alike nor yet do they all think differently. Left to themselves people will think in groups. What is more, they will act in groups, for it is a self-evident truth in politics (as in everything else) that men and women can accomplish more by acting in coöperation than by acting individually. So, when people are in favor of any social, political, or economic program they tend to flock together. This cohesion gives the political party its basis.

The reason why parties are inevitable.

If all people thought alike on political questions there would be no political parties. Or, to be more accurate, there would only be one all-inclusive political party,—as is the case in dictatorships where everyone is compelled to think alike, if he thinks out loud. On the other hand if every man thought differently from his fellows there would also be no parties, for every voter would then be a political party unto himself. So the political party is an inevitable development under every form of government, except dictatorship on the one hand and anarchy on the other. In witness whereof one need only repeat that no country has ever been able to maintain, over considerable periods of time, any form of democratic government without the aid of political parties. And it is safe to prophesy that no country ever will.

Parties have not been formally recognized.

Yet essential as political parties are to the proper workings of government in all democratic countries, they have been compelled to grow up without much nursing from constitutions or laws. The laws have either ignored the existence of political parties altogether or have sought to hold them in check by regulatory provisions. Parties, whether in England, France, or America, are extra-constitutional institutions, not formally recognized as having any influence upon the action of the government. Neither parliament nor Congress has ever admitted that an outside political organization is entitled to dictate its policies or determine the votes of its members. Yet no one who observes the actual workings of either body can fail to note the dominating influence exerted by party platforms, party discipline, and party allegiance in both of them.

But they cannot be ignored by students of government.

Hence, while the Constitution of the United States may ignore the existence of political parties, the student of American government cannot. He must realize that the nation is governed by two sets of political institutions. One of them, regularly organized by the constitution and the laws, we call "the national government." The other, wholly ignored by the constitution and largely ignored

by the laws, we call "the party system." The two have become inseparably linked together; they interlock at every point and make it impossible to understand either one without a knowledge of the other.

The party system contributes greatly to the complications of government.

It is for this reason, also, that government is such a complicated affair. There is a visible mechanism which functions in plain view. But behind it, providing it with momentum, keeping it lubricated, with hands on the throttle, stands a great array of powerful forces which are only half-visible. These forces the party system generates. When people find the study of government a simple affair (as some of them say they do), it is because they see only the husk and miss the kernel. They look at Congress in session and imagine that they are viewing the entire process of lawmaking. They read that the President has sent some names to the Senate for confirmation and assume that this constitutes the whole process of appointment. Their mental process is like that of one who sees the outside of an elephant and imagines that he understands all about the biology of a pachyderm. The superficial anatomy of a government is easy to master, its physiology is not. Political parties have made it so.

The organic functions of a political party:

Now how does a political party figure in the vitals of a government? What are its organic functions? In general a party has four functions. In the first place it singles out and frames political issues for presentation to the public. The intangible things that we call "political issues" do not come into the world ready-made. Every issue begins with the birth of an idea in somebody's mind. Usually this somebody is not a politician, for the average politician rarely begets a new idea and does not always understand an old one. At any rate the new idea is presently transformed into a proposal of legislation; it is advocated and pressed forward by its friends; in due course it becomes a plank in a party platform, and thus evolves into a political issue. The party system nurtures it through these various stages. By means of their programs and platforms, therefore, the parties give the voter a choice among alternatives. There are always two sides to every political question, and sometimes more than two. The ostensible purpose of a party program is to present a series of proposals which will enlist the support of a majority among the voters.

1. To select public issues and present them to the electorate.

Hence an election under the party system is not merely a means of choosing public officials. It is also, in most cases, a popular refer-

Importance of this function.

endum on public issues. The specific political views of individual voters range over a wide area; but as a practical matter they must be willing to make sacrifices of individual opinion to reach common ground. It is the function of party organizations to find that common ground which will attract the greatest number of individual preferences among the voters. Or to express it in another way: it is the function of preparing a political creed upon which large numbers of voters can substantially agree, a creed made up by selecting those aspirations which are uppermost in the minds of the people. This, from the very nature of things is a function which must be performed in every country that maintains a system of free government yet it is difficult to see how, in the absence of something akin to political parties, it would be performed at all.

Although it is not always well performed.

It is quite true, of course, that political parties do not always display honesty and frankness in this work of formulating issues and taking a stand upon them. Sometimes they simply evade or straddle issues which are already dividing the country. A good example was given in 1924 when both the major parties dealt with the tariff problem in a series of hollow platitudes, and again in 1928 when they both evaded forthright declarations on the question of prohibition by professing their allegiance to "law enforcement" in general. Nevertheless, in spite of these evasions, the main issues at each election are usually made clear by the respective platforms or by speeches of acceptance delivered by the presidential candidates. Certainly they are less opaque than they would be if no such pronouncements were made at all.

2. To select the candidates.

Second, the political parties seek out and nominate the candidates for public office. It is a venerable *cliché* of politics that "the office should seek the man." Perhaps it should, but it never does. It is candidates, not offices, that do the seeking, and they do it in such formidable numbers that a preliminary sifting is necessary, otherwise the machinery of election would break down. Now there are no organizations other than the political parties to perform this function of winnowing a hundred candidates down to two or three. The party organizations set up and maintain the selective machinery. Were it not for them it is hard to see how majority rule could be made practicable. The multiplicity of candidates would result in no one's getting a majority at the polls. This is what party conventions and primaries are designed to avoid.

In the third place, it is the function of political parties to pro-

vide a system of collective and continuing responsibility. Responsibility, to be real, must be both collective and continuing. The mere fact that every individual officeholder is responsible to the people does not guarantee a responsible government. Under a system of division of powers they must be *collectively* responsible, and to this end there must be some group or organization which recommends them to the voters and takes the responsibility for what they do. As a penalty for inefficiency and a deterrent to any repetition of it, the mere turning an officer out of his post when his term has expired avails but little. The penalty, to be effective, must also fall on his bondsmen, that is, upon the political party which by nominating him has vouched for his fitness.

3. To establish a collective and continuing political responsibility.

The party thus serves as a guarantor, pledging its own interests and reputation, at times staking its very existence upon the ability and integrity of the men whom it places in nomination for public office. If its candidates are elected and make good, the party gets the credit; if they are elected and fail, the party cannot evade the responsibility. Party leaders are well aware of this, and that is why they hardly ever neglect to remind the people of the great men whom the party has put into office from time to time. It is a rare Republican platform which does not seek to drag in the name of Abraham Lincoln, while the Democrats usually find some excuse for harking back to Thomas Jefferson. A great and striking President becomes a permanent asset to the party which nominated him; a weak or inefficient chief executive becomes a continuing liability even after he has passed from the scene. In a word the party system makes for organic as well as personal responsibility. Without parties the responsibility would go no farther than the officeholder himself, and it would end with the expiry of his term.

How this function is performed.

Finally, the political parties assist the practical workings of popular government. Popular apathy is the great menace to free institutions. The awakening of the voter's interest and the promotion of political discussion are essential in any democracy which seeks to be worthy of its name If every voter were left to inform himself on political questions and to vote without either guidance or leadership, no democratic scheme of government would survive. To bring out the voter you must first bring out the issues and get him concerned about them.

4. To serve as agencies of civic education.

Now the political parties render a great service in this field of political education. They stimulate discussion, fill the newspapers

Their methods.

with their controversies, attract the attention of the people by their rallies, radio broadcasts, parades, and demonstrations, deluge the voter with their circulars, pin a campaign button on him, put stickers on his automobile and carry him (or her) to the polls on election day.

> "If all men took a keen interest in public affairs, studied them laboriously, and met constantly in a popular assembly where they were debated and decided, there would be no need of other agencies to draw attention to political questions. But in a modern industrial democracy, where the bulk of the voters are more absorbed in earning their bread than in affairs of state, these conditions are not fulfilled, and in case no one made it his business to expound public questions or advocate a definite solution of them they would commonly go by default." [1]

It is true, of course, that a great deal of the "literature" which is put out from party headquarters during an election campaign does not possess much genuine educative value. It is propaganda for the most part, and sometimes crude propaganda at that. The same is true of the speechmaking, whether on the stump or in front of the radio transmitter. To that extent the political parties render a negative service in dispelling ignorance from the minds of the people. Yet when all is said and done, the party organizations do stir the people from their mental inertia and compel them to think about public affairs. Indeed, the complaint is sometimes made that they stir things too much and make the election campaign a serious interference with the normal course of business.

Summary of party functions.

These four functions—formulating issues, nominating candidates, maintaining a collective and continuing responsibility, and keeping the political interest of the people alive—no one of them would be performed if party organizations did not take them in hand. They would become everybody's business, that is, nobody's business. The critics of the party system direct their fire against divers abuses which have developed in the performance of these functions.[2] They keep reminding us that political parties often do their work badly, that their motives are fundamentally selfish and that their leadership is sometimes corrupt—all of which is quite true. But the question is not whether parties are disingenuous,

[1] A. L. Lowell, *Public Opinion and Popular Government* (New York, 1913), p. 61.

[2] The reader who would like to read a trenchant criticism of the way in which modern political parties perform their functions will find it in R. Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (New York, 1915).

self-interested, and badly led: the question is whether we can get along without them, or without something like them. And if parties are inevitable in some form, as political history seems to prove, the only sensible course is to tone them up, improve their methods, reform their leadership, and eliminate the abuses so far as we can.

Need of machinery to carry out these functions.

To perform their functions satisfactorily it is essential that parties be given a fair chance. We should not complain because they build up a lot of machinery, for a complex task cannot be performed with simple agencies. Candidates must be brought forward, hence the need for caucuses or conventions or primaries. Candidates, moreover, cannot be elected without effort, hence a party campaign requires funds, leaders, workers, and discipline. That is why we have party committees and officials, party contributions, and the whole complicated mechanism of party organization which we see at work in every campaign. The American party machine is not a chance development. Neither is it the product of human perverseness. It is not even the outcome of political indifference on the part of a people so engrossed in their private vocations as to surrender the conduct of public business into professional hands. It is merely the result of a desire to do in an effective way the things that have to be done in order to make popular government a success.

Advantages of the two-party system.

It will now become more readily apparent, perhaps, why third parties come into existence only when the regular party system is not working smoothly. The most satisfactory working of representative government is secured under a two-party system, one party unitedly supporting the administration, the other presenting a vigorous opposition. When its support is divided, an administration is not sure of its ground; it must compromise in order to command a majority in the legislative chambers, hence its policy cannot be firm or consistent. If, on the other hand, the opposition is divided, the administration will not be subjected to that vigorous and unrelenting pressure which is necessary to keep it on its mettle and to make it ever regardful of its responsibility to the people.

No room for third parties in a smooth-working democracy.

When the two-party system is functioning properly there is no room for a third party or a fourth party, much less for a dozen of them such as exist in Czechoslovakia or Portugal. Multiple parties are usually the result of injecting racial, religious, social, or sectional issues into politics. Consequently they are short-lived,

single-issue organizations. Under a properly organized party system the things which the voters desire will be seized upon by one of the two regular parties and incorporated into its own program long before they can be used as the endowment of a new party. And even though a third party may get hold of a good issue, it must also have leaders, machinery, and funds in order to win. But it takes time and patience to find good leaders, to build up a party organization on a nation-wide scale and to collect the large sums of money which are needed for legitimate party expenses. And by the time all this has been accomplished it frequently happens that public interest in the original issue has disappeared.

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CHAPTER X

POLITICAL PARTIES IN NATIONAL GOVERNMENT: ORGANIZATION AND METHODS

Looking at government from a practical and business-like point of view, it seems to be unquestionably and in a high degree desirable that all legislation should distinctly represent the action of parties as parties.—*Woodrow Wilson.*

Definition of a political party:

What is a political party? This question has been left until after the functions of a political party have been explained, for it is only by knowing what a party does that one can understand what it is.

1. The ideal.

The orthodox definition regards political parties as groups of people who think alike on public questions. While such a definition may be all right as the expression of an ideal, it obviously does not fit the realities of American politics, or indeed of present-day politics in any other country. It indicates what a political party ought to be, not what it is. It implies that every voter's allegiance to a political party is the result of his own thought and reflection, which is certainly not the case. More often it is the result of his ancestry or his occupation, his personal associations, the section of the country in which he lives, or something else that is quite unrelated to his own mental volition. To say that people "think alike" because they belong to the same political party is like saying that they act alike because they belong to the same church. They think quite differently—when they think at all.

2. The realities.

How, then, would a political realist define a political party? It is an organization of voters based on self-interest and bent on getting control of the government. But why do they desire to control the offices of government? To carry into effect (more or less) the party program as set forth in its platform. Hence a political party has to be viewed from two angles. First, it is an instrument for declaring principles and formulating a program. Second, it is a combatant organization, comprising leaders and followers, whose business it is to win victory at the polls as the essential first step towards carrying this program into operation. In other words the political party is both an exponent of public ideals and a functioning mechanism. Ostensibly all its members are in allegiance to

the same ideals; as a practical matter most of them have only a shadowy notion of what the party expects to do in case it wins. All over the world people belong to political parties, and work diligently for their success at the polls without knowing what the party's principles are or what its platform contains. It is merely that they identify their own self-interest with the party's success.

The varied elements which go to make up a political party:

This does not mean that the average voter sits down and reasons out that his own interest will be served by the victory of one party over another at the next election. Far more often he just takes this proposition for granted. He assumes it from force of habit. Every political party, accordingly, has a foundation of "regulars," who stay in its ranks through thick and thin, no matter what happens. Most of these have inherited their political allegiance. They are Republicans or Democrats because their fathers and grandfathers were. Irrespective of issues, leaders or candidates, these regulars can be counted upon. They would support Beelzebub for senator with the right tag pinned on him. For most of their lives they have been nurtured on the iniquities of the political party to which their friends do not belong. "No political party can hope for permanence," a practical politician once remarked, "until it provides itself with a solid foundation of fools." That is putting the situation rather strongly; it would be better, perhaps, to say that a political party sometimes owes its success and permanence to the loyalty of its undiscriminating members. Heredity, at any rate, is a factor in political science as in biology, although it does not obey the Mendelian law.

1. The regulars.

2. Racial groups.

Race is also a factor, especially in urban communities. In the cities there are large bodies of foreign-born voters who have inherited no American political traditions. They are more open to a new appeal than are the native-born whose fathers and grandfathers have bequeathed them a party allegiance. And, as a rule, voters of the same race tend to gravitate into the same political party. In the southern states, for example, virtually all colored voters are Republicans, and for the most part the same is true of colored voters in northern communities. Voters of Irish birth or descent in the cities of New England and the middle states have been chiefly affiliated with the Democratic party. In Boston, for example, fewer than five per cent of the Irish voters are normally Republican. In Philadelphia, on the other hand, there is a large Irish-Republican element. Among voters of German descent the

tendency is to Republicanism, especially in the cities of the Middle West, but not strongly so. The Italians, as a race, have not gone largely into the ranks of any one political party but are well distributed, and the same is true of the Jews. Citizens of Polish ancestry tend to be Democrats, while Scandinavians are strongly inclined to Republicanism although not to the reactionary brand of it. Of course one cannot generalize too broadly on this matter of race and politics for there are notable exceptions to any rule that may be laid down. Political behavior does not lend itself to generalizations.

3. Economic status.

Economic status, in other words the voter's worldly position, has come to be a factor of increasing importance in determining where his vote goes. Nearly one hundred and fifty years ago James Madison averred that the unequal distribution of property was the fundamental basis of party cleavage. The lapse of time is tending to prove that he was right. Everywhere the inclination is for those who have no property to range themselves in opposition to those more fortunately placed. Shiftlessness lines up against thrift and clamors for security. There are some American cities in which the political leanings of any neighborhood can be accurately figured by anyone who takes the trouble to look at the houses in which the people live. It is a case of east side against west side, left wing against right wing, plebeian against patrician as it was in ancient Rome. Sometimes it is difficult to determine whether the boundary follows racial or economic lines, for the two may be closely identified. In any event the happenings of the past few years have caused millions of American voters to shift their party allegiance in keeping with what has seemed to be their economic self-interest.

4. Religion as a factor in politics.

The influence of religion upon party politics is hard to gauge because people do not like to discuss it except in whispers. Yet signs of its existence occasionally come to the surface as in the presidential election of 1928. Religious animosity can be turned by the party leaders to their own account more easily in some sections of the country than in others. Race and religion, moreover, are sometimes conjoined so that they are factors hard to separate. In the New England states, for example, the voters of Irish and Polish descent, who are largely Catholic, tend to become Democrats; but the French-Canadians (who are also Catholics) have tended to join the Republican ranks, and the Catholic Italians

are not monopolized by either of the two major parties. Those who make appeals for political support on religious grounds know that they are playing with dynamite and hence do their work with the utmost circumspection. It is difficult for any onlooker to estimate just what measure of success attends their efforts.

5. Sectionalism and leadership.

Various other forces are at work. Sectionalism is one of them. How a man votes is partly determined by the region in which he lives. Southern Democrats who move to the North often become Republicans in the new environment; while northern Republicans who migrate to the South frequently gravitate into the dominant party there. Social influences dictate the change. A man's political tendencies are influenced to some extent by the company that he keeps. From time to time, moreover, a strong leader with a compelling personality can swing millions of voters to the ticket which he leads. During the years immediately following the presidential election of 1932 the country was given an impressive demonstration of this. The leader may prove stronger than his party and able to swell its ranks for the time being.

6. Inertia and revolt.

Finally, inertia must be reckoned with as a factor of no small importance. Men do not change their party as often as they change their minds. To leave one party and join another takes more self-assertion than most voters possess. The line of least resistance induces them to stay where they are. Nevertheless there is a certain fraction of the electorate which will bolt from the ranks if sufficient provocation is given. How large this fraction will be depends on the degree of provocation. The Democratic party gave its followers a large measure of it in 1928 and the Republican party followed suit in its own ranks four years later. In both instances the number of desertions from the party ranks mounted into the millions. At such junctures people tend to make their party allegiance a matter of free (if sometimes emotional) choice, but these occasions are exceptional. Under normal conditions the amount of free and rational will in this aspect of political behavior is of almost microscopic proportions.

Summary.

So one might venture to give a tentative definition of a political party as a huge association of voters, who, by reason of ancestry, home influence, race, economic status, religion, place of abode, inertia, self-interest, or reasoned preference, allow themselves to be drawn into it. This will hardly serve as an orthodox definition, but it has the merit of being somewhat closer to the realities than

most characterizations of a political party. Likemindedness among the members of a party is perhaps the least visible of all its characteristics. Each party has both conservatives and radicals within its own ranks. Marching under the same banner they are miles apart in their habits of thought.

The need for organization.

Why do people, inspired by such varied motives, associate themselves together in politics? Every political party has two aims, one immediate and the other ultimate. The immediate aim is to win the election and get control of the government; the ultimate aim is to carry out a program by means of this control. To achieve its immediate aim the party must have an organization. for elections can only be won by united effort. Lord Bryce's statement of this matter is so cogent that it deserves insertion here:

> "Organization is essential for the accomplishment of any purpose, and organization means that each must have his special function and duty, and that all who discharge their several functions must be so guided as to work together, and that this co-operation must be expressed in and secured by the direction of some few commanders whose function it is to overlook the whole field of action and issue their orders to the several sets of officers. To attempt to govern a country by the votes of masses left without control would be like attempting to manage a railroad by the votes of uninformed shareholders, or to lay the course of a sailing ship by the votes of the passengers. In a large country especially, the great and increasing complexity of government makes division, subordination, co-ordination, and the concentration of directing power more essential to efficiency than ever before."

For this reason all political parties try to maintain nation-wide organizations. American party organizations have developed from local and rudimentary beginnings, but they are now the most elaborate and efficient institutions of their type in any country. This is not surprising, because Americans have a genius for organizing in every branch of effort, be it work, play, or politics.

Earliest forms of party organization.

During colonial days there existed in various parts of the country, but especially in the New England towns, various clubs which were at first social in character, but which became hotbeds of political discussion during the stormy days of stamp taxes and tea parties. The best known among them was the Caucus Club of Boston. In selecting its name this group coined a word which is now used throughout the English-speaking world. Local clubs in other parts of the country also played a considerable part in colonial politics. After the Revolution they reappeared as "Democratic

Societies," but public opinion did not take kindly to their activities and they eventually went out of existence.

The legislative caucus.

Some form of organization was needed, however, to make the nominations for public office, especially after 1800 when party activities began to grow intense. Inasmuch as there was no other machinery available the function of making these nominations was usurped by the party representatives in Congress and in the state legislatures. The legislative caucus became the backbone of the party organization and remained so until after 1824. No one invented this plan of making nominations and organizing the campaign; it was seized upon by both parties because it was the easiest way. The legislators were party-men; they represented all sections; they were already assembled; and it was much easier to have them do the work than to call special conventions.

Objections to it.

But these legislative caucuses were not favorably regarded by the people at large; they were looked upon as having usurped a function which belonged to the voters. For they were virtually choosing presidents and governors, thus denying to the people that freedom of choice which the constitutions and laws intended to bestow. So antagonism grew stronger as time went on and eventually it became powerful enough to wipe the legislative nominating caucus off the map. Andrew Jackson was the leader of the assault on this caucus system and his victory over it in 1832 was complete.

Replaced by the convention.

But what was to replace the old caucus as an agency for nominating candidates? The answer to this question was quickly provided by the rise of *party conventions*. Conventions of party delegates were called to decide the nominations; this plan rapidly came into general use and by 1836 it had been everywhere adopted. Then, for more than half a century, district or county conventions, state conventions, and national conventions made the party nominations in all branches of American government. Candidates for the presidency and vice presidency are still placed in nomination by national party conventions, which seem to have become rooted in America as firmly as Niagara Falls or the Grand Canyon. With their bands and banners, their ballotings and ballyhoo, their dark horses and favorite sons—these national party conventions are the most characteristically American of all America's contributions to the practical art of politics. They are our quadrennial reminders of how vociferous the Jacksonian brand of democracy was. The procedure of a national party convention, however, can be best

explained in connection with presidential nominations, hence a discussion of this topic is postponed until the next chapter.[1]

The gradual elaboration of internal machinery.

Conventions can nominate candidates, and they can frame party platforms, but they cannot manage a campaign. To do this it is necessary to have committees. So committees were named by the earliest national conventions to canvass the voters, raise funds, get out election literature, and print ballots—for until about fifty years ago the ballots were not officially printed; they were merely "tickets" provided by the party organizations. Then, as the country grew in population and more voters had to be reached, the committees found more work to do. It became necessary to have subcommittees, to maintain a corps of paid workers during the campaign, and to raise much larger sums of money to pay the expenses. Little by little, in this way, the party organization became more extensive and more complicated. Every change added to the mechanism and introduced new complexities. The introduction of the direct primary in many of the states altered the method of making the nominations and of choosing the delegates to the party conventions; but it did not simplify the machinery. On the contrary it made the latter more elaborate.

The present partisan hierarchies.

So we have evolved, by gradual and natural process, that marvelous network of conventions, committees, subcommittees, chairmen, secretaries, leaders, bosses, precinct captains, and other party functionaries covering the land from sea to sea. They form a larger army of professional politicians than can be found in all the rest of the world put together. Their activity is ceaseless—raising money and spending it, planning campaigns and fighting them, nominating candidates and getting them elected. The work goes on without interruption from one end of the year to the other. These committees and officials of all ranks make up what we call the "party organization."

The national committees.

Let us examine this organization somewhat more in detail, beginning at the top. Each political party has a national committee consisting of two delegates (one man and one woman) from each state, territory, and insular possession. These members are nominally selected by the national conventions but they are really chosen by the respective state delegations at these conventions. If, however, the laws of any state make provision for the selection of national committeemen by a state primary, the selection so

[1] See *below*, pp. 163–166.

made is always ratified by the convention. Each state, then, has its Republican national committeeman and national committeewoman, also its two members of the Democratic national committee.

Their work.

The work of the national committees, each in its own field, covers a wide range. These committees fix the time and choose the place for holding each national convention. They issue the calls for the election of the delegates and arrange all the other preliminaries. Then there is the general planning of the election campaign and the selection of subcommittees to take charge of different branches of the work. Likewise the national headquarters attend to the preparation of campaign literature and its effective distribution. Speakers have to be secured; meetings provided for and announced; local committees must be set to work; causes of friction or dissatisfaction here and there have to be eliminated; campaign funds must be raised and apportioned; canvassing and newspaper propaganda organized; and arrangements made for getting out the vote on election day. It is a herculean task.

Functions delegated down the line.

It is not to be assumed, of course, that the national committee as a body looks after all these matters, or even most of them, in a presidential campaign. A large part of the responsibility is assumed by the chairman, assisted by a few close advisers. Moreover, each national committeeman (with his woman associate) is to some extent in charge of the arrangements for his own state, coöperating with the state committee. But the detailed work is in large measure delegated to subcommittees, state committees, auxiliary committees, and local party organizations. The general responsibility, however, cannot be delegated, so that, to borrow a military metaphor, the national committee serves as the general staff of the party forces. The state and local organizations form a hierarchy of divisional, brigade, and regimental staffs which direct the operations of their respective units. The theory of party organization is that it is controlled from below, by the men and women in the party ranks. In actual fact, however, the control and direction, as in military organization, comes always from above. It is only in the event of a mutiny that the ordinary soldier in the party's ranks gets any measure of control.

The chairman of a national committee.

Each national party committee has its chairman who is an outstanding figure in planning the strategy of the campaign. The chairman may or may not be a member of the national committee.

Ostensibly he is chosen by this committee, but in reality he is the personal choice of the party's candidate for the presidency. Sometimes he is imposed on the committee against its will. Anyhow it is an unwritten law that every presidential candidate has the right to name the man who is to conduct his campaign, and as a rule he selects the one who has managed his fight for the nomination.

His qualifications.

No man can have too much skill, ingenuity, resourcefulness, or patience for a national chairmanship. "He must be a master of details, and at the same time capable of taking a correct view of the general situation and endowed with an unlimited capacity for hard work. He must possess the confidence of party leaders and have an almost intuitive grasp of the popular feeling. He must keep in touch with every fibre of the organization, holding frequent conferences with state chairmen in the most important and doubtful states. . . . He must be conciliatory, secretive yet approachable, keen in his choice of helpers, able to command the service of the most effective workers in the party, and capable of making them work in unison without overlapping." [1]

His functions.

The national chairman is often a factor of great importance in determining the party's success or failure at a presidential election. He must select the vulnerable spots in the fortifications of his adversaries, and bolster up the weak places in his own. He virtually decides how and where the campaign funds of his party shall be spent, allotting them as his judgment dictates to this or that purpose, or to this or that section of the country. It is for him to determine what states need little or none. To do this successfully requires him to be a good forecaster, an adroit handler of men, able to generate enthusiasm and a "will to victory" among his lieutenants. After the election, if his party wins, he is usually given an influential voice in the distribution of patronage. He knows, of course, the ones who have been of most help in the campaign and his business is to see that they or their friends are duly rewarded when the spoils of political victory are distributed. To this end the chairman of the national committee is sometimes made a member of the cabinet.[2]

[1] P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3rd edition, New York, 1924), pp. 173–174.

[2] Postmaster-General Farley, for example, was chairman of the Democratic national committee in the campaign of 1932 and retained this office after entering the cabinet.

The secretary and the treasurer.

Next in point of importance to the national chairman (but far below him) is the secretary of the national committee. He is the office man in charge of his party's national headquarters,[1] supervising the enormous amount of correspondence which comes and goes, besides handling the innumerable details relating to the itineraries of campaign speakers, the publication of campaign literature, and the coördination of the varied other campaign activities. Important also is the post of treasurer, for upon him rests the chief responsibility for raising the millions which are necessary to run the campaign. In this work he counts on the assistance of a finance committee.

Auxiliary committees.

A national committee maintains a number of subcommittees, or auxiliary committees, made up to some extent from its own members but including also a number of prominent party workers outside. Among these the executive committee stands first in importance, but the finance committee, publicity committee, speakers' bureau, organization committee, and various other groups have lots of work to do. All of them function under the general direction of the national committee and under the immediate supervision of the national chairman.

The congressional campaign committees.

The work of the national committee and its subcommittees is restricted, for the most part, to presidential campaigns. The special function of assisting the party's candidates for the national House of Representatives is handed over to a separate committee, known as the congressional campaign committee. Each party maintains a committee of this type. Their chief work comes midway between presidential elections when congressmen are being chosen in the "off-years." In organization they are like the national committees, being composed of one member from each state and territory chosen by the caucus of each party in the House.[2] Each of the two major parties also maintains a small senatorial committee the members of which are named by the chairman of their party caucus in the Senate. These committees try to promote the interests of their respective parties at senatorial elections in the several states.

[1] In recent campaigns it has been customary to have two national headquarters, one in New York and one in Chicago.

[2] In the Republican congressional committee there are no committeemen from states which send no Republicans to Congress; in the Democratic committee there is a committeeman to represent every state even states which send no Democrats to Congress.

State and local auxiliaries.

It goes without saying, however, that these national committees, subcommittees, and officials cannot do all the work which a national campaign involves. They lean heavily upon the state party organizations. The details of state party organization will be explained at an appropriate place later on, but it is worth while to mention here that each state has its state chairman, its state central committee, and all the rest. Not only this but there are county chairmen and committees and the organization finally ramifies down into cities, wards, towns, and townships. Thus the party organization forms a huge pyramid with the national chairman at its peak and thousands of local subcommitteemen at its base.

The need of intense effort in a presidential campaign.

In a national campaign this great machine, and every wheel in it, is run at full speed. From the smallest village or township committee through the district and state organizations, the party's entire strength is put forth in unison. For it must always be remembered that the outcome in the nation may hinge upon victory or defeat in a single state. New York turned the scale in 1884; California did it in 1916. A relatively slight lapse from sound political tactics was responsible for the defeat of Mr. Blaine in the one case and of Mr. Hughes in the other. On either occasion the shifting of a few thousand votes would have changed the line of presidents. Mishaps of this sort have taught party leaders the value of capable guidance, good discipline, thorough organization, and intensive work right down to the closing of the polls.

The candidate's part in it.

The presidential candidate, of course, is the central figure in all this activity. The national chairman is constantly in touch with him and is guided by his advice. In some cases the chairman is the adviser and the candidate defers to his judgment. Before the advent of the radio it was customary for presidential candidates to go about the country making speeches, and they still do it to some extent; but the art of broadcasting has greatly lessened the need. Nevertheless what the candidate does and says during the campaign is still of far-reaching importance to his party. One bad slip may cost him the election. It is desirable, moreover, that representatives of the party all over the country shall sing the same tune without making discords. To this end they are provided with a speakers' handbook and other guides to exactitude. From this they deliver their quotas of dehydrated oratory.

Party finance.

The activities of a political party in a national campaign require large expenditures. In the presidential campaign of 1932 the two

major parties spent several million dollars each. Nor do these figures tell the whole story, for every state committee also has its campaign fund for use in the state. Likewise the various city, county, district, and town committees have campaign funds of their own. Being raised and spent independently, these state and local outlays are not included in the national totals. Nobody knows, in fact, just what it costs to finance a general election in the United States, from the primaries in May through the conventions in June to the close of election day in November. Fifteen million dollars would probably be a conservative estimate. It seems a large sum, but it is only about thirty cents per registered voter.

How campaign funds are raised.

To secure these funds the first step is usually to send out circulars asking for contributions. These circulars go to all party leaders, all candidates, all elective officeholders belonging to the party,[1] all who have contributed in previous campaigns, and to all others from whom subscriptions may for any reason be expected. A good deal of money comes in response to this preliminary call. But a second and more urgent appeal is commonly required to stir up those who have not replied. No party war chest, however, can be filled by merely sending out circular letters. Personal solicitation must also be undertaken, especially to get large contributions. This work is done by the national and state party treasurers; hence it is always desirable to have as treasurer someone with a wide personal acquaintance among men of means. Contributors are actuated in their giving by a variety of motives. Many do it because of their sincere desire to see the party and the candidate win. Others do it because they hope for favors in the event of victory. Still others respond because they believe it is good business policy to have influential friends in proximity to the throne, hence they give with an equal hand to both parties. The motives of men are not always visible to the naked eye, especially in politics.

The control of campaign funds by publicity.

Various old-time evils connected with the raising of campaign funds have now been eliminated by the legal requirement that the subscription lists be made public. An act of Congress, passed in 1925, requires the national party committees to file before the election detailed statements of all their receipts and expenses,

[1] The civil service laws now forbid the solicitation of funds from appointive federal officeholders and employees.

showing who have contributed to the funds and where the money is being spent. Similar reports must be made after the election and at stated intervals between elections. Limitations are also placed upon the amount of money which a candidate for election to the Senate or the House of Representatives may spend to secure his own election. And corporations are forbidden to make contributions to campaign funds. Thus the law no longer looks upon the national party funds as political patronage to be used as the custodians see fit, but as semi-public money to be collected and disbursed under strict governmental supervision. One salutary result of this has been to make the party leaders more dependent upon small contributors and hence more directly accountable to the rank and file of the voters.

What the people want.

The whole problem of campaign expenditures goes back to the people. Most voters enjoy a real campaign, the kind that stirs everybody's interest. But a lively campaign is certain to cost a lot of money—money for campaign literature and postage, for hall rent, for the travelling expenses of speakers, for newspaper advertising, for radio broadcasting, for parades, for the remuneration of a host of workers, and all the rest. If the people resented all this activity (which is designed to arouse their interest) it would soon come to an end. But they do not resent it; they like it. They complain when the campaign is a dull one. And so long as the people relish the sort of campaign that costs money one may rest assured that money will be raised and spent.

Relation of partyism to the American system of government.

There is a reason (apart from the American genius for organization) why the American party system has developed so much more machinery than have the party systems of England or France. The connection between central and local administration, and between the legislative and executive organs in these countries is provided for within the frame of government itself. In the United States no single organ of government, President or Congress, has power to shape the entire national policy. Yet public policy ought to be carried into operation by the organs of government acting in unison, and to secure this accord is the aim of each political party. So whatever the theory of the constitution may be, the party organizations have become in fact the great policy-unifying factors in American government. The larger part of what Congress does is at the behest of the President or the other party leaders. The larger part of what it puts upon the statute-books is by way

of redeeming promises made in the platform of the victorious party.

The pressure of non-partisan organizations.

Recent years, however, have seen the appearance of various non-partisan organizations of great political strength whose influence upon Congress has been of high importance. Among the best known of these are the National Farm Bureau Federation, the Chamber of Commerce of the United States, the American Federation of Labor, the American Legion, the National Association of Manufacturers, and the National League of Women Voters. These pressure groups have their affiliated organizations in every section of the country and can bring pressure to bear on any congressman from within his own home district. Hence they have always to be reckoned with when legislation is under way. They share with the regular party organizations the function of supplying the motive power in national lawmaking. Occasionally these non-partisan pressure groups have shown themselves more powerful than the party organization in moulding the attitude of Congress. When important measures are under discussion they promote a barrage of telegrams and letters to congressmen from constituents as a means of influencing congressional action. The leaders of these pressure organizations go to the microphone and over a regional or national hook-up beseech their followers to bombard Washington by wire or air mail. On one notable occasion in 1934 it is estimated that over 100,000 telegrams and letters reached members of the United States Senate within a week. Because of the unity of interest which exists within each pressure group, and the intensity with which this interest is promoted, these bodies exert an influence out of proportion to their numerical strength. Both the major political parties seek their favor and fear their wrath.

Self-interest divisions that cross party lines.

Political parties, as such, do not exert so much influence on the course of public policy as they did a generation ago. Economic problems have come to the forefront and the battle over legislation has developed into a contest between cross-party groups which feel their own personal interests at stake. To the extent that governmental action now directly affects the pockets of business men, farmers, workers, legionnaires, and other organized bodies, one must expect them to seek their own advantage through political channels. They carry on propaganda for their cause, they support or oppose candidates on that issue, their representatives appear

at committee hearings in Congress and they focus upon the individual legislator all the pressure they can command. The activities of these non-partisan but extremely aggressive bodies are worthy of more attention than they have hitherto received from students of American government.[1]

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[1] Those who are minded to learn more about this interesting phase of American politics may be referred to books by Peter Odegard entitled *Pressure Politics* (New York, 1928), and the *American Public Mind* (New York, 1930); also to E. P. Herring, *Group Representation before Congress* (Baltimore, 1929).

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CHAPTER XI

THE PRESIDENT

The constitution gives the President wide discretion and great power. It calls from him activity and energy. He is no figurehead.—*William H. Taft.*

Fifteen words of great significance.

"The executive power shall be vested in a President of the United States of America." In these fifteen words the framers of the constitution established what has become the most powerful elective office in the world. Yet they did not intend this office to be one of far-reaching jurisdiction. On the contrary it was their expectation that the presidency would be looked upon as a post of honor and leadership rather than as one of commanding authority. They did not realize that with the growth of the nation it was certain to become the center of federal authority and the symbol of national unity.

The need of a single executive.

Why was the presidency established? It was largely because there had been no provision for a chief executive in the Articles of Confederation. Executive work had been handled by committees, and later by secretaries, but this arrangement proved altogether unsatisfactory, and it was generally agreed that in the new government a one-man executive ought to be provided. All the state constitutions, moreover, had made provision for governors. A plural executive at the head of the federal government would place the nation at a disadvantage in its dealings with the states. At any rate the decision to have a President was reached without much argument, although Edmund Randolph of Virginia registered a vigorous objection on the ground that a single executive would serve as "the foetus of monarchy." But as to how the chief executive would be chosen, whether he should be independent of Congress or not, and what powers he should have—these matters were not so easily decided.

The presidential term.

As for the proper term, method of selection, powers, and functions of the executive there were nearly as many different opinions as there were delegates. Hamilton expressed a preference for life tenure; a few others were willing that he should hold office during good behavior; but the majority were for limited terms ranging

from two to twelve years. After a good deal of discussion they agreed on a seven-year term, with a provision against reëlection; then they reconsidered the matter and ultimately fixed the term at four years with no limitations on the number of times that a President might be elected to the office.

The anti-third-term usage.

But where the constitution remained silent, usage has stepped into the breach. Washington was reluctant to take a second term, and flatly declined a third, giving as his chief reason "the advancing weight of years." Jefferson declined to be a candidate after he had served two terms, and based his refusal on the expressed belief that third terms would be incompatible with the public interest. Jackson, in 1836, might have had a third term but declined the opportunity. Grant and Theodore Roosevelt both sought third nonconsecutive terms but failed, one in the nominating convention, and the other at the polls. Calvin Coolidge could probably have had a third term, but he startled the country by announcing in 1927 that he did not "choose to run." Thus the tradition seems to be fairly well established. From time to time, however, there have been proposals to have a constitutional amendment limiting a President to eight years in office, or, as an alternative, to provide a single, six-year term without reëligibility; but none of these proposals has as yet passed Congress.

His position in relation to Congress.

Even more difficult than the question of term and reëligibility was the problem of how to choose the President. Most of the delegates favored a proposal to let Congress do the choosing, and that plan was provisionally adopted. But at a later stage the members of the convention became convinced that such an arrangement would destroy their system of checks and balances. The question was therefore reopened and finally settled in an entirely different way, namely, by the expedient of indirect election. There were a few who favored direct popular election, but the majority were strongly opposed to that plan because they feared that it would open the door to the choice of demagogues. Accordingly they adopted the plan of indirect election by presidential electors because it seemed to have fewer objections than any other among the various methods proposed.

The original method of choosing the President.

This plan, as outlined in the constitution, is a relatively simple one and allows a great deal of latitude to the states. Briefly, it provided that each state should "appoint in such manner as the legislature thereof may direct" a number of "electors" equal to

the state's combined quota of senators and representatives in Congress. For example, a state having two senators and five representatives would choose seven electors. In due course these electors were to meet, each group in its own state, and give their votes in writing for two persons, of whom at least one must not be an inhabitant of the same state as the electors. The ballots were then to be sealed and transmitted to the president of the Senate, who was directed to count them in the presence of both Houses and to announce the result. The person receiving the most votes was to be President, provided he obtained a clear majority of all the electoral votes, and the one obtaining the next highest number was to be Vice President if he fulfilled the same requirement.

The provision in case of an inconclusive election.

Some of those among the framers of the constitution expected that very seldom would any candidate receive this clear majority. James Wilson, one of the leaders in the convention, predicted that it would not happen once in twenty elections. So provision was made that in case no one obtained a majority of the electoral votes the House of Representatives (voting by states and each state having one vote) should choose from among the five highest. Note that in thus "voting by states" every state was given an equal voice no matter what its population. New York has forty-seven electoral votes, while Nevada has only three; but when the election is thrown into the House of Representatives the provision is that each of these states has one vote only. The congressmen from each can merely decide how the state's single vote shall be cast. In the event of a tie it was provided that the issue would be settled in the same way. The stipulation that the House should vote by states, not by individual members, is significant. This was looked upon as a very important concession to the small states and a partial compensation for what they had surrendered in the Great Compromise.

Where it came from.

The plan of indirect election had the merit of satisfying those who, in 1787, opposed the idea of election by the people. It gave the large states an advantage on the electoral ballot, but raised the small states to a plane of equality with them in case these electors failed to give any candidate a clear majority. The idea was a modification of a proposal put forth by Alexander Hamilton, who seems to have taken it from Maryland, where the fifteen members of the upper house in the state legislature were chosen by electors who represented the voters in each county. Hamilton's

motive, of course, was to get the choice of the President into the hands of men who would give careful consideration to what they were doing.

Motives which dictated the selection of this mechanism.

The debates in the convention indicate that most of the delegates were skeptical of direct popular election, for they had read ancient history to some purpose. They knew that tyrants and dictators in Greece and Rome had frequently been catapulted into their posts of power by the acclaim of the multitude. Let the states appoint electors, therefore, and commit the choice of the President to these electors. Men appointed for this high electoral responsibility would inevitably be leaders in their respective states and the function of choosing the President might well be left to them with complete confidence. It was a safe, if not an altogether democratic plan. Certainly it looked well on paper and the delegates felt that it would satisfy the country.

How it worked in the earliest elections.

For a time it seemed as though they were right. When the provisions of the constitution were made public there was almost unanimous approval of the plan for indirect presidential elections. Almost every other feature of the new constitution was assailed; but this one escaped the barrage of criticism. And in the first two elections the scheme functioned exactly as its originators intended.[1] Then a different course began to shape itself. At the third election (1796) it was well understood, even before the electors met, that most of the presidential electors would vote for either John Adams or Thomas Jefferson, although in no case were any pledges exacted. In 1800 things were carried a step further. Two well-defined political parties, Democratic-Republicans and Federalists, had now arisen, and at the election of that year both put forth their candidates. Electors were chosen upon the understanding that they would vote for the nominees of their party. The Democratic electors marked their ballots for Jefferson and Burr while the Federalist electors did the same for Adams and Pinckney. No other candidates were considered. The function of electoral deliberation thus became a fiction; henceforth the electors were to serve as mere automatons, selected because they would do what they were told to do. The heart of the original plan was cut out within ten years, and never since has there been any serious attempt to restore it.

[1] In 1789 and in 1793 all the electors voted for Washington (thus making him the unanimous first choice) but their second choices were well scattered, thus indicating that they were using their individual judgment and were not being pledged in advance.

Results of this change.

The people, not the electors, have been choosing the President and the Vice President for more than a century. This is because all the state legislatures have directed that presidential electors shall be chosen by popular vote and these electors are always pledged to the nominees of the national party conventions. The electoral college has thus become a rubber stamp, although it continues to go through its gestures every four years. Why is it not abolished? The answer is that its abolition would require an amendment to the constitution, and this would precipitate a controversy as to what provision should be made in case no presidential candidate receives a popular majority at the polls. Obviously the present plan of equal voting by states ought to be discarded if the House of Representatives is to do the ultimate choosing in case of an indecisive election, but the smaller states would be reluctant to ratify any amendment which surrenders their present advantage.

A defect in the original plan.

The election of 1800 was also significant in that it disclosed a serious flaw in the constitution as the framers worded it. The constitution in its original form provided that the electors should vote for "two persons" without designating which was the elector's choice for President and which for Vice President. In 1800 Jefferson and Burr both received the votes of all the Republican-Democratic electors, which meant, of course, that they got an equal number of votes. They had been put forward by their political party with the intention that Jefferson should be chosen President and Burr Vice President; but the plan went awry because both received "the highest vote" which according to the constitution was to determine the choice of a President, and neither obtained the "second highest" which was to designate the Vice President-elect.

How it eventuated.

Happily the framers of the constitution had been foresighted enough to insert the provision that in case of a tie the House of Representatives should determine the choice, and the House did so, choosing Jefferson President on the thirty-sixth ballot after an exciting contest. To have made a President out of Aaron Burr would have been something of a calamity. As a safeguard against any future mishap an amendment (the twelfth) was added to the constitution in 1804. This provided, among other things, that the electors in the several states should "name in their ballots the person voted for as President, and in distinct ballots the person

voted for as Vice President." So the electors now cast two ballots, where originally they marked only one.

The indecisive election of 1824.

During the seventy years following the adoption of the twelfth amendment presidential elections were held without any trouble of a serious nature. In 1824, it is true, no candidate for President received a clear majority of the electoral votes, and the House of Representatives once more had to make the choice. It selected John Quincy Adams, much to the disgust of Andrew Jackson's supporters who felt that because Jackson had obtained more electoral votes than Adams he ought to have been chosen by the House. There was some talk of again changing the constitution, but nothing was done.

The Hayes-Tilden controversy.

It was not until the election of 1876 that another perplexing difficulty arose. From several states, on that occasion, two different sets of electoral certificates were received. Who should determine which of these was valid and entitled to be counted? The constitution had not anticipated this dilemma; it merely provides that "the president of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted." As it happened, however, the Senate at this time contained a majority of Republicans and the House a majority of Democrats. Accordingly, if the president of the Senate opened one set of certificates from the disputed states, the election of Rutherford B. Hayes, the Republican candidate, would be assured; but if he construed the constitution to mean that the two Houses should decide what certificates should be opened, then the Democrats would have a majority in the joint session. In that case they would order the other certificates to be opened and the election would go to Samuel J. Tilden. As a further complication the joint rules of the two Houses provided that no disputed election returns should be counted unless both the Senate and the House of Representatives, acting separately, should so authorize.

How it was settled.

Under this rule there seemed to be no possibility that either set of votes could be counted or either candidate elected. The two Houses would not go into joint session until they knew what they were doing. In some countries such an impasse would have led to serious trouble. In more than one of the Latin-American republics a less awkward situation has precipitated a civil war. But in the United States the counting of votes is the end of a

revolution, not the beginning of one, as has too often been the case south of the Rio Grande. So the statesmen of the Republican and Democratic parties put their heads together and found a peaceful solution.[1] Briefly, they agreed that Congress should establish a special electoral commission of fifteen persons, five senators chosen by the Senate, five representatives named by the House, and five justices of the Supreme Court. This commission was to investigate the validity of the disputed returns and decide which ones should be counted. Then both Houses would accept their decision. The commission was duly constituted; it heard both sides of the controversy; and its rulings determined the election of President Hayes.[2]

Its sequel—the act of 1887.

While the matter was finally settled in this way, the situation was tense for a time and Congress felt the desirability of making sure that a similar controversy should not occur again. After prolonged discussions and various delays it finally enacted a statute (1887) dealing with the whole subject of disputed votes, and this law is still in force. It provides that each state must now determine, in accordance with its own laws, any disputed questions concerning the choice of presidential electors from that state. If in New York, for example, two groups of electors claim to have been chosen at the polls, and the courts of New York have decided in favor of one group, the votes of this group will be counted. But if the issue has not been decided by the state courts, each branch of Congress shall pass on the matter separately and if they fail to agree, then no votes from the state are to be counted at all.

The present method of election.

Thus far we have been speaking of a presidential election from the standpoint of the constitution and the laws. But from neither of these does one get an adequate idea of the way in which the election is actually conducted. The constitution provides only three steps—the choice of electors, the voting by electors, and the

[1] P. L. Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876* (New York, 1906).

[2] Of the 369 electors, 184 were pledged to Tilden (Democrat), 164 to Hayes (Republican), and 21 votes were in dispute, namely, those of South Carolina, Florida, Louisiana, and one vote from Oregon. To the electoral commission the Senate appointed three Republicans and two Democrats, while the House of Representatives appointed three Democrats and two Republicans. Of the five Supreme Court justices, three had been Republicans before their appointment to the bench and two had been Democrats. Thus the electoral commission, as finally constructed, contained eight Republicans and seven Democrats. All, however, took an oath to decide the issue on its merits and impartially. On every disputed question, nevertheless, the commission divided on straight party lines and gave the entire twenty-one disputed votes to Mr. Hayes.

opening of the electoral certificates in the presence of Congress. But by usage two other steps have developed, so that there are now five in all. The first three are of great importance, while the last two, the voting by electors and the opening of the electoral returns, have become mere formalities unless something quite out of the usual occurs.

Presidential Nominations

First step: nomination of candidates.

First of all there is the nomination of candidates, a matter on which there is not a word in the constitution, for it was not intended that there should be any nominations. The first formal step in the electoral process nowadays is the calling of the national party conventions, but before this is done there is a great deal of informal grooming of the prospective candidates. The call for a national party convention is issued by the national committee, which is a body made up of party delegates from all the states.[1] Each committee calls its own national convention, decides the time and place, and makes the preliminary arrangements. Usually the calls are issued in January of a presidential year, while the conventions meet in June and July, the Republicans generally meeting first and the Democrats a few weeks later.

Stages in nomination procedure:

1. The calls for the party conventions.

2. Selection of delegates to the party conventions.

During this interval the political parties in each state select their own delegates to the national conventions. Until recent years every state had twice as many delegates as it had senators and congressmen combined. The Democratic national convention is still constituted on that basis, but the Republican national convention is organized according to new rules which were adopted in 1923. Under these rules every state now gets four delegates-at-large, two delegates for each congressman-at-large (if it has any),[2] and three additional delegates if it went Republican at the last presidential election; in addition each congressional district has one delegate, and an additional delegate if it cast at least 10,000 Republican votes at the last election. Delegates are also allotted, by both parties, to the territories and insular possessions. The total membership of each national convention is well over a thousand delegates.

In addition it is usual to let each state select an equal number

[1] See *above*, p. 147.

[2] A congressman-at-large is one elected by the whole state and not by a congressional district. For the reason why states occasionally have congressmen-at-large, see *below*, pp. 301–303.

The alternates.

of alternates, who serve in case the regular delegates are absent. Accordingly, if all the delegates and alternates are in attendance, the total runs to nearly twenty-five hundred. Full delegations, however, do not go to any except the Republican and Democratic conventions. The national conventions of other parties, such as the Prohibition and Socialist parties, are much smaller bodies.

Methods of choosing delegates and alternates.

How are these delegates and alternates chosen? Prior to 1905 they were chosen by party conventions held in the states and congressional districts. But in that year, following the lead of Wisconsin, some of the states inaugurated the practice of choosing the delegates by direct primaries. The idea spread widely and today about twenty states use this plan while the rest continue the older method. In a smaller number of states there is provision for a presidential *preference* primary in which the voter not only casts his ballot for delegates to the convention but indicates the presidential candidate for whom he desires these delegates to vote.[1] In a few states the delegates are definitely bound to follow the majority preference, as thus expressed; in the other states the expression of preference is merely for their guidance.[2]

3. The conventions.

Then comes the meeting of the convention. The Republican convention usually meets in one city, while the Democratic convention assembles in another, but the procedure in each convention is much the same. In the front portion of a great hall the delegates are seated, with the alternates occupying the rear. A temporary chairman is chosen, usually without any opposition, and proceeds to deliver a "keynote" speech in praise of the party's achievements and opportunities. A committee is then appointed to examine the credentials of the delegates. When its report has been adopted the convention elects a permanent chairman (who also unburdens himself of a speech) and proceeds to consider the party platform. This platform has been framed in advance by a committee. Some "planks" in it may give rise to debate, but as a rule the platform is adopted without much change.[3]

Finally, on the third or fourth day, the great item on the calendar is reached, and nominations for the office of President are announced by the chairman to be in order. The roll of the states is

[1] For a full discussion see Louise Overacker, *The Presidential Primary* (New York, 1926).

[2] For comment on the merits and defects of presidential primaries see *below*, pp. 174–176.

[3] See the bibliographical references on p. 139.

called in alphabetical order, Alabama first and Wyoming last. The chairman of any state delegation, or anyone deputed by him, may make a nomination. If a state has no candidate of its own, no "favorite son" as he is called, it may yield its place in the alphabet to some other state. Thus Alabama may yield to New York and the chairman of the New York delegation will proceed to nominate his candidate in an eulogistic address. The nomination is then seconded, with further eulogy, by some selected delegate from another state. These nominations and speeches may take a whole day, or perhaps a couple of days.

4. Balloting on nominations.

After the nominations have been made the voting begins. It is not by ballot but by a voice vote. At Democratic conventions the "unit rule" is frequently applied, that is, the vote of the entire delegation from each state must be given intact whenever the state laws so permit. A majority in each state delegation decides how it shall be cast. At Republican conventions, on the other hand, the vote of the delegation from any state may be cast as a unit if the state laws permit, or it may be split if the delegates so desire, some of the votes being cast for one candidate and some for another. In any event the votes are reported, in response to the roll call, by the chairman of each state delegation.

The repeated roll calls.

The rules of the two conventions differ also in the number of votes required to make a nomination. In the Republican national convention a candidate is nominated if he secures a majority of the delegates; but in the Democratic national convention he must obtain a two-thirds vote. Hence, when several candidates are in the running, with strong support, it is often necessary to take ballot after ballot before any one of them fulfills the requirement. As the polling goes on, the weaker candidates drop out; votes are shifted around on successive ballots; one roll call follows another until a decision is reached. The convention hall, in these midsummer days, often becomes a sweltering place and the delegates are thoroughly wilted before a decision is reached.

Some examples.

It required thirty-six ballots to nominate Garfield at the Republican national convention of 1880. Woodrow Wilson, at the Baltimore convention of 1912, was not chosen until forty-six ballots had been taken. At the Democratic national convention of 1924 it required one hundred and three ballots to make a nomination. On the other hand a national party convention sometimes makes its choice on the very first ballot. Both conventions

were able to do this in 1928. When the presidential candidate has been chosen, the selection of the party nominee for the vice presidency is made in the same way, but usually with less trouble, and sometimes in a great hurry, for the big fight is over and the delegates are in a mood to get home.

A great spectacle.

A national party convention in the United States is a picturesque gathering. There is nothing exactly like it anywhere else on earth. The great concourse with its flag-bedecked stage and walls, the crowded floor and aisles with delegates milling around, the blaring bands, the galleries filled with cheering onlookers, the atmosphere electric with excitement,—all this makes a spectacle not soon to be forgotten. A European spectator, looking at this sweltering throng, might wonder how a great nation expects to uncover good presidents by such turmoil methods. The answer is that it doesn't. The nominee is not really chosen by this howling mob of perspiring delegates. They are merely behaving like dervishes while the issue is being settled for them outside.

Where the trick is being turned.

For a relatively small number of leaders and bosses usually have the convention in hand. Somewhere, away from the madding crowd, usually in the back parlor of a nearby hotel, these highlights of the party are leaning across a table, conferring, bargaining, and deciding how the votes of their followers shall be swung. Sometimes they find it a hard job but all energies are concentrated upon it, for they know that if they fail the convention may stampede and do some foolish thing. As a rule they do not fail although the dickering may be prolonged over several days. Meanwhile the convention keeps up its daily round of balloting until the word comes down. Then the deadlock breaks; the delegates tumble over one another in their anxiety to be with the winner, and the nomination is made in a whirl of enthusiasm. Thereupon the nominee is formally notified, and if practicable is brought before the convention to express his appreciation. When Franklin Roosevelt was nominated by the Democratic convention in 1932 he at once flew to Chicago and addressed the delegates before they adjourned.

Second step: the nomination of electors.

With the framing of platforms and the naming of candidates the party conventions have finished their work. The next step is the nomination of presidential electors in the several states. In each state the political parties put forth their slates of electors, nominated in whatever way the state laws prescribe. These electors

are usually prominent party workers, but must not be federal officeholders. Their names go on the ballot in parallel columns, and on the day set for the national election in November the voters in each state decide which group of electors shall be chosen. When the voter marks his ballot for a certain group of electors, however, he is in reality indicating his preference for one of the candidates already named by the national conventions. The ballots do not bear the names of these presidential candidates, or, if they do, it is merely to guide the voters in voting for the desired group of electors. To all intents, nevertheless, the balloting is just as direct as though there were no intervening electors at all.

Third step: the election of electors.

But the results are not necessarily the same. The candidate who gets the most votes in the country is not absolutely certain to be elected. This is because the electors in each state are virtually always chosen as a group.[1] The party which polls a majority elects its entire slate, while the other party elects none. No matter how small the popular majority, it suffices to elect the entire quota of presidential electors from the state. At the election of 1884, for example, the Democratic plurality in New York was only 1,149, but it was sufficient to give Grover Cleveland the entire group of thirty-six presidential electors from that state, thus ensuring his election. On the other hand a large popular majority in any single state has no bearing on the outcome of the election. No matter how large it does not add any additional electors. As a matter of actual experience, however, the President-elect has almost invariably been the choice of both the electors and the people. There is a possibility of divergence between these two, but it has rarely been realized.

The electoral vote and the popular vote.

So the election is virtually determined at the polls in November. Nevertheless the constitution requires two further steps in the choice of a President. The electors who have been chosen in each state must come to their own state capital and go through the motions of balloting for the candidates whom their party nominated at the national convention several months before. No constitutional or legal provision prevents them from marking their ballots for someone else, but they never do. Morally they feel pledged and they vote accordingly. Hence the votes of the electors

Fourth step: election of the President by the electors.

[1] This is true even though the electors may be voted for individually. There is seldom any reason why a voter should mark his ballot for some electors in one column and some in another.

never vary from the calculations which were made immediately after the November polling. Suppose, however, that one of the candidates nominated for President by the national party conventions should die during the interval between the November polling and the assembling of the electors. Would the electors then deem themselves entitled to make a free choice as the constitution intended? Probably not. It is more likely that the national party committee would meet, decide on a new candidate, and instruct the electors of the party to mark their ballots for him. Under ordinary conditions such an instruction would be followed.

Final step: transmission and counting of the votes.

When the electors have marked their ballots, and these ballots have been counted, a certificate from each state is immediately sent to Washington attesting the result. There, as has been said, the president of the Senate supervises the opening of the certificates in the presence of both Houses of Congress. As a rule this is a pure formality and merely discloses what everybody knew before. But it may happen that the result is a tie, or that no candidate has received a clear majority of the total electoral vote. Then the House of Representatives proceeds to choose a President from among the three candidates who have stood highest in the electoral returns. And in this balloting they vote by states, not as individuals.

Indecisive elections.

In case the electors have failed to elect a Vice President by a clear majority, or in case of a tie, the Senate makes the choice between the two highest candidates—the senators voting as individuals and not by states. On only two occasions, the last of them more than a century ago, has the House been called upon to select a President and on only one occasion (in 1837) has the choice of a Vice President been decided by the Senate.

The twentieth amendment.

Prior to the adoption of the twentieth amendment in 1933 the President was inaugurated on March 4, four months after the November polling. This interval often proved embarrassing because an outgoing President could accomplish little during these last months even though a critical situation might demand action. So it is now provided that the terms of the President and Vice President shall end at noon on January 20, and the inauguration will hereafter be held on that date. Likewise the twentieth amendment stipulates that if a President-elect dies before the beginning of his term, the Vice President-elect shall become President. Or if, when the inauguration date arrives, no President has been

elected or has qualified, the Vice President-elect shall act as President until the matter is settled. This provision takes care of the possibility that an indecisive presidential election might be thrown into the House of Representatives and that this body, which meets on January third, might be unable to make a choice within the seventeen days that are available before the inauguration date. Finally, the amendment gives Congress power to determine by law what shall be done in case neither a President nor a Vice President has been elected when January twentieth arrives.

The inauguration of a President.

At his inauguration the President takes the oath of office which is prescribed in the constitution. Ordinarily this is administered by the Chief Justice of the United States during a public ceremony at the east front of the capitol. But when a President dies in office, and a Vice President succeeds him, the latter takes the oath at once and in private. Calvin Coolidge, as many will recall, was sworn in by his father, a rural justice of the peace, whom he happened to be visiting in Vermont when President Harding's sudden death occurred.[1] No official act can be performed by the President until he has taken the oath, which is as follows: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Why Great Men Are Seldom Chosen

Lord Bryce on the presidency.

In Lord Bryce's analysis of the spirit and workings of American government a notable chapter is devoted to the question, "Why great men are not chosen Presidents":

> "Europeans often ask," wrote Bryce in 1888, "and Americans do not always explain, how it happens that this great office, the greatest in the world, unless we except the Papacy, to which anyone can rise by his own merits, is not more frequently filled by great and striking men. . . . Since the heroes of the Revolution died out with Jefferson and Adams and Madison," he continues, "no person except General Grant has reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln has displayed rare or striking qualities in the chair." [2]

These statements are not now so easy to defend as they were fifty years ago. Many Americans regard Grover Cleveland and

[1] Rather curiously, Mr. Coolidge (although himself a lawyer) wired to Washington for the wording of the oath, overlooking the fact that it could be found in the constitution.

[2] *The American Commonwealth*, Vol. I, chap. viii.

The nation has not always utilized its greatest men.

Woodrow Wilson as "great" presidents, even when measured with John Adams or James Madison; and there are few who would deny to Andrew Jackson or Theodore Roosevelt the possession of "striking qualities." Among the various Presidents of the United States, from Washington to Franklin Roosevelt, there have been quite as many great and striking figures as one can discover among the prime ministers of England during the same period. There have been men of small caliber in the White House at times, but Downing Street has also had its share of them.[1] The French Republic, during the past sixty years, has had an even more generous quota of small-caliber presidents. America is not alone in permitting mediocrity to gain, at times, the highest honor in the land.

Some illustrations of this.

Still, the query propounded by Lord Bryce is a suggestive one and deserves discussion. The United States has failed to utilize in the presidential office a long line of outstanding statesmen: Hamilton, Marshall, Gallatin, Webster, Clay, Calhoun, Seward, Sumner, Blaine, Hay, and others. On the other hand, it has bestowed its highest honor on men like Polk, Fillmore, Pierce, Arthur, and Harding, of whom no one now knows (or cares to know) much except that their names have achieved immortality on the roll of chief executives. Certain it is that the standard has not been so high as the Fathers of the Republic expected, for Hamilton in 1788 voiced the prediction that "the office of President will seldom fall to the lot of anyone who is not in an eminent degree endowed with the requisite qualifications. . . . It will not be too strong to say that there will be a constant probability of seeing the station filled by characters preëminent for ability and virtue."

Availability counts for more than personal merit.

Several factors have contributed to the election of presidents who did not prove to be of conspicuous merit. In the first place, the greatest asset of a presidential candidate is "availability." A candidate has this political virtue if his temperament, his affiliations, his public record, and his reputation seem to fit the needs of the moment. At the approach of one election campaign there may be many aspirants with the desired qualities; at other times a party may be hard pressed to find anyone who comes at all near qualifying. There may be plenty of "presidential timber" or a great scarcity of it. It sometimes happens, therefore, that a man who is by common agreement the strongest possible candidate in

[1] A full account may be found in Clive Bigham, *The Prime Ministers of Great Britain* (New York, 1922).

one year may be wholly out of the running a few years later. The right candidate during an era of national prosperity is likely to be just the wrong candidate in an economic depression. Availability and personal capacity are not necessarily conjoined. A candidate may have one without the other, and high-voltage presidents are not manufactured out of low-voltage candidates.

Long political experience is a liability rather than an asset.

On the face of things one might suppose that long experience in political life would be an asset to any presidential aspirant; but in practice it usually is not. The man who spends a long term in public office has either proved himself a weakling or he has made plenty of political enemies. By supporting some measures and opposing others he will have antagonized many voters. People are inclined to vote their resentment rather than their appreciation, hence a man with a long record in public office is not usually looked upon as likely to make a strong candidate. On the other hand candidates for the presidency are not taken directly from private life. Of the presidents during the past fifty years three (Harrison, McKinley, and Harding) served in Congress before going to the White House. All the others possessed executive experience. Taft and Hoover had been in presidential cabinets; Cleveland and the two Roosevelts had served as governors of New York, Wilson as governor of New Jersey, and Coolidge as governor of Massachusetts. Experience, therefore, but not too much of it, seems to be what is required. America does not test out her presidents, as Britain apprentices her prime ministers, over a long period in posts of public responsibility.

The influence of the "pivotal" states.

It is politically desirable, again, that presidential candidates shall be taken from what are called pivotal states. This results from the fact that the outcome of the election is not determined by the plurality of the total votes cast by the people but by a majority of the electors chosen. The successful candidate must carry enough states to control this electoral majority, hence he ought to be strong in those sections of the country which provide most of the presidential electors. If one will look over the presidential nominees of the two major parties during the past fifty years it will readily be seen that geography, quite as much as personal qualifications, has had to do with the selection.

Its practical importance.

Obviously anyone who aspires to the presidential nomination is at a disadvantage if he comes from a very small or heavily partisan state. A presidential candidate should come from a doubtful

state that is worth carrying. The southern states are strongly Democratic; no Republican candidate has been picked from any of them since the party was organized. On the other hand it is almost inconceivable that the Democrats, under ordinary conditions, would select their standard-bearer from a state which is hopelessly Republican. Good political strategy dictates that a presidential candidate should be someone who is stronger than his party—who can carry certain states which the party would not ordinarily capture. His ability to do this may arise from his great prestige in some section of the country, or it may result from his general popularity irrespective of section. Only three presidents during the past fifty years have come from states other than Ohio and New York.[1] And in every presidential election since the Civil War at least one of the major candidates has been from one of these two pivotal states.

Types of candidates:

It has been customary to say that there are always three classes of aspirants for the presidential nomination, namely, "logical candidates," "favorite sons," and "dark horses." The logical candidates get into the running early, sometimes a year or two before the election. On paper they appear to have the elements of strength; they draw support from various parts of the country and not infrequently manage to pledge a considerable fraction of the delegates before the convention meets. A President who is serving his first term is always regarded as a logical candidate for a second term. It is only with great difficulty that anyone else can take the nomination away from him, and it has not been done in either party during the past fifty years.

1. "Logical candidates."

2. "Favorite sons."

The favorite sons are those who are brought forward by their own states even though they may have very little strength outside it. There is a hope that other states, particularly in the same region, may eventually lend a hand. Sometimes the favorite son is merely a stalking-horse, put forth as a means of retaining freedom of action for the party in his own state. The local delegation pledges its support to him as a means of warding off any attempt to capture it for someone else. Then, at the convention, the delegation can be used for trading purposes, and as such may be influential in turning the scale. In other instances the favorite son may be a real candidate and stay in the balloting to the end.

[1] These were Wilson of New Jersey, Coolidge of Massachusetts, and Hoover of California.

3. "Dark horses."

Then there are dark horses in profusion during the preconvention stages of every campaign. These ebony equines are not avowed candidates, but keenly receptive. Their chief hope lies in the possibility of a deadlock. With two or three strong candidates in the field there is always a chance that the national party convention will take ballot after ballot without giving anyone the requisite majority. Then, as the delegates grow weary and discouraged, the dark horse is brought forth by the leaders in the name of compromise. The Republican candidate for the presidency in 1880, James A. Garfield, afforded a striking illustration. The convention did not turn seriously to him until it had found itself deadlocked on thirty-five successive ballotings.

Personal factors in the choice.

Many factors influence the choice of presidential candidates. A man's religious belief, his leanings to liberalism or conservatism, his business affiliations both past and present (especially his connection with great corporations, if he has had any), his acceptability to the business interests, or to the labor organizations, his record for party loyalty, his attitude on specific current issues, and the general impression of himself which he has stamped upon the public mind—all these things weigh in the selection. Yet they are not directly related to the possession of great intellectual capacity or administrative skill. It is the business of the convention to nominate a good candidate rather than to see that the country gets a good President. Hence the ablest statesman in the land may be regarded as inferior, in point of political availability, to some amiable compromiser from a pivotal state. To answer Lord Bryce's question one might say that great men are not always elected to the presidency because great men do not necessarily make strong candidates. The party's objective is a great victory, not a great President.

The time of the election.

The policy of rigidly fixing the date on which a presidential election must take place has also had its effect. In England a general election must occur once in every five years. But within this limit an administration can "go to the country" whenever it pleases. It can avoid a time when public opinion seems to be running adversely and can choose a moment when some striking administrative success or some popular stroke operates heavily in its favor. But in the United States a President cannot seek a reelection whenever a propitious juncture appears. He must wait till the constitutional date arrives. Hence the party leaders, in

choosing the candidates, must have regard to the public temper of the moment. If everything is going prosperously throughout the land the "safe and sane" type of candidate has an advantage. But if the date for an election looms into view with the country in a depressed and discontented frame of mind, then the advantage passes to someone who can impress the people with his ability to provide remedial leadership and give the country a new deal. That was the case in 1932. There are fair-weather candidates and there are those to whom the voters turn when the skies are darkened.

Ups and downs of the presidency.

Yet the American presidency, when all is said, has maintained a reasonably good level of ability and statesmanship, save for a lapse at one period. It has been "one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him." [1] During the first forty years of its existence, that is, from Washington to Jackson, the standard was high. Then it began to slip, and it kept slipping until the election of Lincoln in 1860. Since the Civil War there have been big and little men in the White House, and some who fall in neither classification. Cleveland was a great President, by whatever standard judged; Theodore Roosevelt was a striking one; and Wilson's place in history is assured by reason of the epoch-marking events from which his name can never be dissociated. As for the four presidents who have been in office during recent years, their claims to greatness are as yet controversial—and a textbook is no place for political controversy.

What of the future?

Looking into the future, there is nothing to indicate the likelihood of a decided change for better or for worse. A quarter-century ago, when the spread of presidential primaries assumed the proportions of a landslide, it was predicted that the new method of choosing presidential candidates would quickly put an end to those maneuvers and deals at national conventions which had often resulted in sending second-rate men to the executive mansion. That prediction has not been fulfilled. The plan of asking the voters to express their preferences at the polls, and of pledging the delegates in accordance with such preferences, does not afford protection against political trading when the national party conventions assemble.

[1] Woodrow Wilson, *Constitutional Government in the United States* (New York, 1911), p. 67.

Will presidential primaries help?

The reason is that delegates cannot be sent to a national convention with definite instructions covering all eventualities. Situations will arise in which a delegation must be free to act. The candidate to whom they are pledged may withdraw from the race, or his prospect of getting the nomination may become a hopeless one. Then the delegation must be free to use its own discretion in supporting someone else. It is in the process of making this shift that the opportunity for a trade arises. The candidate who will promise the most favors is the one who usually captures the loose delegations. The fundamental difficulty with the presidential primary is that the choice of a presidential candidate is not usually a matter of selecting one from two, but one from a dozen. Such a task involves something more than the mere marking of a cross on a ballot.

Some of its defects.

The presidential primary has been greatly impaired in effectiveness because various states hold their primaries at different dates. The results in one state naturally (and sometimes quite unfairly) influence the others. Not all the candidates who hope to have their names presented at the convention, moreover, are willing to enter the primaries. In states where they fear that they may be losers, the stronger ones deem it good political strategy to stay out. In theory the presidential primary gives every voter the opportunity to choose between the leading contenders for the party nomination; in practice it often fails to do so. Frequently it bids them choose between a favorite son and a forlorn hope, neither of whom has the slightest chance of figuring in the final convention ballot.

They are serious.

In general, therefore, the presidential primary system has been a disappointment. No states have adopted it in recent years, while some of those which were among the earlier converts to the plan have given it up. And even assuming that the practical difficulties could be overcome, there is no assurance that the use of the presidential primary on a national scale would result in the nomination of better candidates. State conventions, as nominating bodies, have been supplanted by state primaries in many parts of the Union. The results have not been up to expectations. Campaigns for the nomination have become more expensive to candidates; the voters are called to the polls on an additional occasion; trading among candidates has by no means disappeared; and on the whole there has been no appreciable improvement in the quality of the nominees. Nominating conventions have their evils and abuses,

but the primary does not seem to offer a satisfying remedy. In eliminating certain troubles it besets us with others. An improvement in the great and striking qualities of American presidents will have to be sought, therefore, by some more comprehensive means than the mere selecting of party delegates at presidential primaries.

Salary and allowances.

The remuneration of the President is fixed by Congress, but it may not be either increased or diminished during the term for which he was elected. At present it is $75,000 per annum. In addition various appropriations for secretaries, clerks, travelling expenses, the care and maintenance of the White House, and so on are annually made, amounting to about three hundred thousand dollars. Even this, however, is not a large amount when compared with the cost of maintaining the chief executive in European countries.

Presidential immunities.

The President has certain constitutional immunities. He may not be haled into any regular court either as witness or defendant. At the trial of Aaron Burr the Supreme Court issued a summons to President Jefferson who declined to obey it on the ground that the court had no such power. "Would the executive be independent of the judiciary," asked the President, "if he were subject to the commands of the latter, and to imprisonment for disobedience?" [1] The court eventually accepted the principle for which Jefferson contended and agreed that the President, in the exercise of his constitutional powers, is beyond the reach of any other department.[2] The only tribunal before which the President can be brought is the United States Senate, sitting as a court of impeachment, as will be later explained.[3] However, he may waive his immunity and appear in court as a witness if he sees fit. On one occasion President Grant did this.

The vice presidency.

The framers of the constitution made provision for a Vice President, although one of them remarked in the course of the debates that such an official was not wanted and that the position was merely being established as a consolation prize inasmuch as it was to be bestowed upon the candidate getting the second-highest vote from the electors. Benjamin Franklin, in whimsical mood, suggested that the Vice President should be addressed as

[1] *Jefferson's Writings*, edited by Paul Leicester Ford (12 vols., New York, 1904–1905), Vol. IX, pp. 59–60.

[2] Kendall *v.* United States, 12 Peters, 524 (1838).

[3] See *below*, pp. 286–291.

"His Superfluous Highness." If Congress had been given power to choose the President, as was the original plan, there would have been no need for a Vice President; for in the event of a vacancy the national legislature would choose a new President without delay. That is what happens in the French Republic where the national assembly does the electing. But when the election of the American President by presidential electors was decided upon, it became apparent that there would be objections to leaving the presidential office vacant until new electors could be chosen and could act.

So the vice presidency was established to meet such a contingency. Its incumbent is elected in the same way and for the same term as the President. "In case of the removal of the President from office," says the constitution, "or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve upon the Vice President." [1] It will be noticed that this wording does not give the Vice President any right to assume the title of President. It merely provides that the powers and duties of the presidential office shall devolve upon him. But John Tyler, the first Vice President to fill a vacancy, took the title as well as the powers, and his example has since been followed.

Some moot questions concerning it.

On six occasions since 1789 the death of a President has elevated the Vice President in accordance with this provision of the constitution. No President has resigned or been removed by impeachment, and in no case has the succession come because of "inability to discharge the powers and duties" of the office, although President Garfield was for more than two months in 1881 physically unable to perform any important official act, and President Wilson was similarly incapacitated for a considerable length of time during the latter part of his second term.[2] Both these cases led to some discussion as to just how much "inability" there would have to be before the Vice President could step in and assume the presidential powers. Whose function is it to declare, moreover, that a President by reason of a physical or mental illness is no longer able to discharge the powers and duties of his office? Neither the constitution nor the laws give answer to that

[1] Article II, Section 1.

[2] Absence from the United States, even for months at a time, does not constitute "inability to discharge the duties" of the presidency—as President Wilson demonstrated during his absence in France.

question. Presumably it would be in order for the Vice President (in response to a joint resolution of Congress) to issue a proclamation, countersigned by the secretary of state, announcing that by reason of the President's inability to discharge the powers and duties of his office, the same had devolved upon the Vice President. Then, in case the existence of actual inability were questioned, the courts could decide it.

The succession law of 1886.

In case the Vice President is for any reason not available to succeed the President, the constitution gives Congress the right to determine the order of succession, and Congress has so provided by the presidential succession act of 1886, naming the various then-existing cabinet officers according to the seniority of their posts: the secretary of state, the secretary of the treasury, secretary of war, attorney-general, postmaster-general, secretary of the navy and secretary of the interior. But no one of these officials may succeed to the presidency unless he is a natural-born citizen and otherwise eligible. When a vacancy occurs in the office of Vice President, it is not filled till the next election. During the interval the secretary of state stands as the heir-apparent. But thus far, in nearly a hundred and fifty years, the succession has never passed beyond the Vice President because the two offices have never become vacant at the same time.

The Vice President

Position and duties of the Vice President.

A few words, but only a few, should be added with reference to the position and duties of the vice presidency. The framers of the constitution intended the office to be a dignified one and a sort of preparatory school for the chief executive position. They expected its incumbent to be a man second only to the President in the favor of the electors and in line for the higher post at the next election. During the first few decades this view of the office persisted; but with the practice of nominating the candidates at national conventions it was gradually lost to view. Thereupon the vice presidential nomination came to be used as a means of strengthening the party ticket. It is still so used. It goes, as a rule, to balance the ticket geographically or to someone who can placate a disgruntled or disappointed faction of the party, or bring some doubtful state into line, or secure large contributions to the party's campaign funds. The personal merits and capacity of the candidate have not been the controlling factors during the past hundred

years, nevertheless some men of marked ability have found themselves installed in this office.

Presiding officer of the Senate.

When the constitution was being framed, one of the delegates suggested that the Vice President should be given something to do. So they made him presiding officer of the Senate. But he is an outsider there, has no vote except in case of a tie, appoints no committees and has nothing more than perfunctory powers. Theodore Roosevelt, when he held the post of Vice President, referred to it as "an office unique in its functions, or rather in its lack of functions." During the Harding administration (1921–1923) Vice President Coolidge was invited to attend meetings of the cabinet and regularly did so. But Vice President Dawes, during the Coolidge administration, declined a similar invitation, and the practice has not since been regularly resumed.

The constitutional qualifications.

No one is eligible to the presidency either by election or by succession unless he be a natural-born citizen, thirty-five years of age or more, and unless he has been a resident of the United States for at least fourteen years. A special exemption as to natural-born citizenship was made in the constitution for those who were citizens at the time of its adoption, this being done as a matter of courtesy to Alexander Hamilton, James Wilson, and others who, although not born in the territory which formed the Union, had taken a considerable share in establishing the new government.

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See also the references at the close of Chapter XII.

Route #1

CHAPTER XII

PRESIDENTIAL POWERS AND DUTIES

The presidency is a great office. If a man is fit to be President, he will speedily so impress himself on the office that the policies pursued will be his anyhow.—*Theodore Roosevelt.*

Parliamentary and presidential executives.

The science of government has developed two kinds of executive power, which are commonly known as *parliamentary* and *presidential.* A parliamentary or responsible executive is one which derives its power from the legislature and is responsible to that body for all its official acts. It holds office so long as it commands the confidence of the legislative body, and no longer. Under this arrangement the legislature is the supreme organ of government, for it can change the executive at any time. Great Britain is the classic example of a country with a parliamentary executive, the prime minister being virtually chosen by and directly responsible to the House of Commons.

A presidential or independent executive, on the other hand, does not derive its powers from the legislature but directly from the people. Hence it is beyond the power of the legislature to control. It continues in office whether the support of the legislature is retained or lost. This is the type of executive that exists in the United States. The President exercises authority in his own right, not as the agent of Congress.

Which type is the better?

Much has been written about the relative merits of these two forms of government. Both have their strong and weak features. The British system has the merit of ensuring strong leadership in the lawmaking body, and of getting measures put through with businesslike efficiency; but it also lends itself to the concentration of power in a single hand. The prime minister rules Britain with a cabinet of his own selection, and this cabinet has become in some respects the real lawmaking body of the kingdom, with parliament merely endorsing its decisions. The American plan, in keeping with the principle of checks and balances, is assumed to have the merit of preventing the undue concentration of governmental authority, but it leaves Congress without constitutional leadership and thus

slows down the legislative mechanism. It is true that there are times when a strong President, with a majority in both Houses behind him, can constitute himself a virtual prime minister and practically dictate the legislative program of the government; but the surrender of discretion which Congress makes on such occasions is both voluntary and temporary. Its constitutional authority can be resumed at will.

Why the United States chose the presidential form.

The architects of the American constitution set out to create a government that would be automatically protected against tyranny—whether of the President, Congress, or the courts. They did this because they had in mind the experience of colonial days when royal governors had usurped authority and used it oppressively. They did it, moreover, because the whole history of mankind, prior to 1787, seemed to prove that a strong executive was merely a sugar-coated synonym for personal autocracy. It provided a gateway for "low ambition and the pride of kings." So the ghosts of historical tyrants, from Dionysius to Louis Quatorze, kept flitting in and out of the old brick hall where the constitution was being drawn. Someone has said that the convention took George III as its model of what the American President ought not to be, and proceeded to create his antithesis—which it did not wholly succeed in doing.

Sources of the President's authority:

1. The constitution.

The President of the United States derives his principal powers directly from the constitution which gives him, in express terms, the right to veto acts of Congress, to appoint officials of government and to make treaties (with the advice and consent of the Senate), to pardon offenders, to be commander-in-chief of the army and navy, to call special sessions of Congress, to demand written reports from the heads of the executive departments, to take care that the laws be faithfully executed, and to preserve, protect and defend the constitution. These are constitutional powers which Congress can neither weaken nor take away.

2. The federal laws.

But, in addition to the powers bestowed upon him by the express terms of the constitution, the President of the United States has acquired a good deal of authority by statute. Congress, from time to time, has given to the President a wide range of discretion in supplying the details of the laws. In 1933, for example, it gave him discretionary power to reduce the gold content of the dollar, to issue additional paper money and to purchase silver as a partial currency reserve. The congressional legislation of the years 1933–

1935 contained a great many other instances of power conveyed to the President for exercise by him in such way as he might deem advisable. These acts of Congress did not require the President to do the things mentioned but left them to his judgment, thus conferring upon him a range of authority which was in effect a power to legislate. In one case this action went so far as to constitute what the Supreme Court held to be an unwarranted delegation of power.[1]

3. Judicial decisions.

Again, the President has obtained some powers by means of court decisions. Where the constitution is silent, the judiciary has sometimes intervened to render it articulate. This document, for example, gives the President the right to pardon offenders, but does not say whether he may pardon a man before he is convicted. The Supreme Court has held that he possesses such power.[2] Likewise the constitution provides that the President shall appoint certain public officials with the advice and consent of the Senate, but it does not say whether this advice and consent shall be required for the removal of such officers. The Supreme Court has held that the President's power of removal can be exercised without consulting the Senate.[3] Many other examples might be given.

4. Usage.

Some presidential powers have also been acquired by usage. He has a right to be consulted on all important matters affecting the interests of his party, both in Congress and out of it. For he is the titular leader of the party which elected him. As such he virtually selects the chairman of its national committee and through him directs the party's activities. But usage also limits the President's powers. For example, the constitution gives him full power to make appointments, subject only to the approval of the Senate; but the party system imposes upon him the obligation to consult with the individual congressmen of his own party before he makes appointments in their districts. There is nothing in the constitution or the laws to suggest that appointments shall be used as patronage, but usage has developed it to a well-recognized policy. Theodore Roosevelt once asserted the doctrine that it is the President's right "to do anything that the needs of the nation demand unless such action is forbidden by the constitution or the

[1] See *below*, pp. 441–442.
[2] *Ex parte* Garland, 4 Wallace, 333 (1866).
[3] Myers *v.* United States, 272 U. S. 52.

laws." This was characteristically Rooseveltian but hardly to be accepted as sound governmental philosophy.[1]

The grouping of executive powers.

It is not easy to make a logical grouping of all the powers and functions which have been acquired by the President from these various sources, but most of them can be arranged under seven principal heads, namely, (a) to serve as the nation's chief executive and to secure a faithful enforcement of the laws, (b) to make appointments and removals, (c) to exercise the prerogative of pardon, (d) to conduct diplomatic relations and negotiate treaties, (e) to send messages to Congress, issue executive orders when empowered by law to do so, and either sign or veto acts of Congress, (f) to be commander-in-chief of the army and navy, and (g) to exercise the wide range of influence which accrues to him as the titular leader of his party. These powers are of such extensive scope as to warrant their careful consideration, one by one.

The Enforcement of the Laws

Express and implied executive powers.

The President is the nation's chief executive, and there are implied executive powers as well as implied legislative powers. It is hard to determine the exact limits of the term "executive power" as used in the constitution but the courts have been inclined to construe it liberally. In the famous Myers case, for example, the Supreme Court held that the President's right to remove public officers without the advice and consent of the Senate is implied in his general endowment of executive power and could not be restricted by any action of Congress.[2]

The faithful execution of the laws is an administrative function, not a judicial one. The President has no right to suspend the execution of a law because he believes it to be unwise or unconstitutional. It is for Congress to decide the wisdom and the courts the constitutionality. The laws of the United States, however, include more than the statutes which have been passed by Congress. Treaties are included, because a treaty has the force of law. If the United States, for example, agrees to deliver up or extradite

[1] For the views of recent Presidents concerning what the functions of the presidential office are, or ought to be, the reader may be referred to W. H. Taft's *Our Chief Magistrate and His Powers* (New York, 1916); Grover Cleveland's *Presidential Problems* (New York, 1904); Theodore Roosevelt's *Autobiography* (New York, 1913), especially chap. x; Benjamin Harrison's *This Country of Ours* (New York, 1898), especially chaps. iv-xix; and Woodrow Wilson's *Constitutional Government in the United States* (New York, 1911), chap. iii.

[2] Myers *v.* United States, 272 U. S. 52 (1926). See also *below*, p. 191.

foreign fugitives from justice, that treaty becomes binding on all executive officials from the President down. With the execution of state laws, on the other hand, he has nothing to do.

The Appointing Power

Major and minor appointments.

Obviously the President cannot give personal attention to the execution of the federal laws throughout the United States. He must perform this duty through subordinates, hence the constitution empowers him to make the necessary appointments, including "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." These other officers include the members of the cabinet and their assistants, the officers of the army and navy, the postmasters, customs officers, immigration officers, internal revenue collectors, the judges and attorneys of the subordinate federal courts together with the great host of minor officials who have gained places on the federal payroll.

In the entire national service of the United States there are now more than 700,000 officials and employees of all grades. They range from the heads of the major departments at Washington down to postmen on the city streets and laborers in the forest service. All professions and trades are represented among these,—undersecretaries, assistant secretaries, bureau chiefs, commissioners, attorneys, engineers, geologists, accountants, statisticians, appraisers, customs examiners, bank examiners, auditors, supervisors and instructors on Indian reservations, coast guardsmen, health and quarantine officers, marshals, collectors and deputy collectors of revenue, unemployment relief officers, officials connected with the bewildering number of recovery agencies, national park and forest workers, weather forecasters, clerks, stenographers—every form of vocational interest is represented. Together it is these seven hundred thousand men and women who "see that the laws are faithfully executed." Not one of them is elected. All are appointed by the President or by his immediate subordinates. Here, then, is a far-reaching presidential power, but there are limitations upon it as will presently be explained.

The constitution divides all appointive offices into two classes, namely, those higher posts which must be filled by the President with the advice and consent of the Senate, and those "inferior"

Appointments subject to senatorial confirmation.

offices which may be filled, if Congress so provides, by the President alone, or by the heads of departments, or by the courts. In the category of higher officers (appointed by the President with the concurrence of the Senate) are the members of the cabinet, the undersecretaries and the assistant secretaries, all ambassadors, ministers and consuls, all federal judges and court officials, members of the various federal commissions such as the interstate commerce commission, the federal trade commission, the federal communications board, the tariff commission, and the various other permanent commissions, together with postmasters in large communities, collectors of customs, and collectors of internal revenue. Promotions in the army and navy, above a certain rank, are also subject to senatorial confirmation. The line of demarcation between those appointments which require senatorial confirmation and those which do not is fixed by Congress when it establishes the office to which the appointment is made. And Congress has vested in the President alone, or in the heads of departments, the appointment of some very important officials while requiring confirmation in the case of others whose duties are not of great consequence. It has not been a matter of logic but of congressional temper at the moment.

Recess appointments.

When confirmation is required the President sends his nomination to the Senate, which may confirm or reject it. If the Senate be not in session when the nomination is made, the nominee takes office at once and holds what is termed a "recess appointment" until the Senate reconvenes and confirms him, or until the next session of the Senate comes to an end. If not confirmed by that time the appointment lapses. But the President may forthwith give the same person a new recess appointment which will carry him over to the end of another session. Occasionally this procedure has been utilized to keep in office someone whom the Senate has declared its unwillingness to accept. A safeguard, however, is provided in the fact that a recess appointee, if the vacancy existed while the Senate was in session, draws no salary until his appointment is confirmed.

Usage in the matter of confirmations.

The Senate has an undoubted right to refuse its approval to any nomination which the President may send. But as a rule it allows the President to name the members of his own cabinet, confirming these nominations as a matter of course. On only one occasion during the past fifty years has it refused its approval to anyone se-

lected by the President for cabinet rank.[1] And this is a proper attitude, for in selecting the members of his immediate official family the President should be given a free hand. Appointments to the diplomatic service are also confirmed without challenge save in exceptional instances. In all other cases, however, the Senate's power is one to be reckoned with. As a rule, nevertheless, it does not withhold its consent except for some avowed reason, but much depends upon whether the President and a majority of the senators are of the same political faith. A bare majority of the senators present is sufficient to confirm a presidential appointment. It does not require a two-thirds vote as in the case of ratifying treaties.

The rule of senatorial courtesy.

Many years ago there developed a curious twist in connection with the practice of confirming appointments. It is commonly known as the "courtesy of the Senate." Stated briefly, this is the custom of refusing to confirm the nomination of any local officer, such as a federal attorney, postmaster, or collector of internal revenue, unless the individual senator or senators from the state concerned have been previously consulted and have given their approval—provided, of course, that these senators are of the same political party or party faction as the President. To put it more concretely, a Republican President must not nominate anyone as postmaster at Philadelphia without first consulting the Republican senators from that state. If he does so, the other senators, out of courtesy to their Pennsylvania colleagues, are supposed to vote against confirmation.

Its flexibility.

Senatorial courtesy has had its ups and downs; it has been strong enough at times to hamstring the chief executive almost completely; on the other hand some presidents have successfully defied it. President Garfield, for example, locked horns with the two senators from New York State on this issue in 1881 and won a signal victory. President Theodore Roosevelt, to use his own words, "normally accepted each senator's recommendations for offices of a routine kind, such as post offices and the like," but "insisted on personally choosing the men for the more important positions." Still, no matter what the President's personal inclinations may be, he is sure to find that he can avoid trouble by antagonizing the individual senators as little as possible. The President has only half the appointing power; the Senate has the rest.[2]

[1] This was the case of Charles B. Warren whom President Coolidge nominated to be attorney-general in 1925.

[2] See also *below*, pp. 279–281.

Minor offices.

But the great majority of federal appointments do not require confirmation at all, either with deference to senatorial courtesy or in defiance of it. As respects the thousands upon thousands of subordinate positions in the federal service, the power of appointment has been vested in the heads of the various departments, such as the postmaster-general or the secretary of agriculture. More than ninety-five per cent of all federal appointments are in this category. Many of these positions are still treated as "patronage" and are filled on the recommendation of congressmen from the districts concerned; but the greater portion of them have now been placed in the "classified service" and the appointees are chosen on a merit basis under civil service rules.

How filled: The earlier practice.

In the practice of filling appointive offices the United States has passed through three stages. The first extended from the beginning of the federal government down to the accession of Andrew Jackson in 1829. During these forty years the number of federal officers was small; most of them came from the older seaboard states, and were men of some importance in their own communities. When a new President came into office some changes were usually made, but most of the incumbents stayed on. There was no general turning out of officeholders in order to make room for the friends of a new administration.

Spread of the spoils system.

But in 1828 Andrew Jackson swept over the country like a tropical tornado, to use Henry Clay's picturesque simile. He came to Washington with a mandate from the people to clean out the federal service. Accordingly, large numbers of officeholders were ousted from their posts in order that partisans of the new frontier democracy might be put in their places. By this action Jackson is commonly said to have brought "the spoils system" into American politics. It would be more accurate to say that Jackson greatly extended a system which was already in existence. Moreover, he proclaimed quite openly the doctrine that government offices ought to be passed around among the victors, like the spoils of victory after a battle. Calling the spoils system by its right name, he raised it to the dignity of a national principle.

Its persistence.

And during the next half-century this system ruled the politics of America, supreme and unashamed. Virtually all positions in the government service, even the lowest, were frankly treated as patronage and distributed among the faithful on the morrow of each presidential inauguration. When a new administration came

in, virtually everybody holding a place on the federal salary-list went out. Personal competence counted for very little, sometimes for nothing at all. Applicants never spoke of their skill or training, but only of their past services and their influence in politics. Every congressman made promises during his campaign and then had to make them good by wresting a share of the patronage.

Its results.

Under this system the public service became badly demoralized. Men who could not make a living in any private vocation turned to the government service. A large part of the President's time was taken up by senators and representatives who came to the White House in endless succession seeking jobs for the payroll-patriots of their own states and districts. Then, in turn, these congressmen gave most of their energy to the task of pacifying avaricious supporters who wanted to batten themselves on the public treasury. It was political mendicancy on a huge scale and dulled the self-respect of everyone connected with it.

The Garfield tragedy.

But although the ramifications of this system were regretted by most intelligent Americans, the vicious circle of power and patronage was hard to break. Reformers protested, but their voices were as of men crying in the wilderness. Public opposition to the spoils system eventually began to crystallize, however, and in 1881 there came a tragic happening which roused the country to the need for action. The newly-inaugurated President, James A. Garfield, was assassinated by an office-seeker whose demands had been refused. Things had come to such a pass that a President could only deny patronage at the risk of his life. The country rebelled at the idea and both political parties hastened to promise the abolition of the spoils system. Early in 1883, therefore, Congress passed the Pendleton act, which was the first American civil service reform law.

The Pendleton act.

Present civil service arrangements.

As subsequently amended, and greatly widened, the civil service laws now provide for a federal civil service commission of three members appointed by the President.[1] This commission is charged with the duty of examining all candidates for positions in what is known as "the classified service," which now includes about seventy-five per cent of all the employees of the national government. The civil service commission receives applications for positions in this classified service; it holds examinations, and when a

[1] Confirmation by the Senate is required. It is also required that not more than two of the three commissioners shall be from the same political party.

vacancy occurs it transmits to the appointing authority the names which stand at the head of the list. The commission is assisted by a staff of secretaries, clerks and examiners who examine more than 300,000 applicants each year. The examinations are publicly announced by circulars displayed in the post offices and other public places all over the country. They are not of the academic type, but are related to the nature of the work which the appointee is expected to do.

Advantages of the merit system.

This method of selection on a merit basis has been of great advantage to the public service. It has deflected the importunities of office-seekers and given the President time for more urgent things than the distribution of loaves and fishes. While it is true that the merit system has not given complete satisfaction, it has undoubtedly improved the standards of work throughout the federal service.[1] Unfortunately the civil service laws require that the examinations shall relate to the specific work of the position to which the candidates seek to be appointed. This precludes the giving of examinations such as would test the general intelligence and broader intellectual capacities of the various applicants. The existing system awards an advantage to anyone who is familiar with the special routine, even though he may be lacking in general capacity. In this respect the American technique in civil service examinations is different from the English, the latter being designed to test all-round competence.

Its future.

The civil service system has had hard sledding. It is unpopular with the politicians. Hence the responsibility for administering it has sometimes been placed in unfriendly hands. Congress, moreover, has frequently excluded large numbers of positions from the classified service and the practice of giving an undue preference to veterans has impaired the integrity of the merit system. But in spite of these handicaps the plan has made progress and its technique is being steadily improved. The civil service system has its shortcomings, no doubt, but even at its worst it is a conspicuous improvement upon the spoils system at its best.

Removals

Early practice.

The constitution does not say how appointive officials are to be removed. Its framers apparently took for granted that they would

[1] For a discussion of the merit system in its practical workings see Lewis Mayers, *The Federal Service* (New York, 1922).

stay in office until they died or resigned. But the problem of dismissing officials for incompetence presently arose and at the first session of Congress in 1789 the question was debated. Some congressmen felt that the approval of the Senate ought to be required, but in the end the matter was settled by a tacit agreement that the President should have power to remove without securing the consent of the Senate. On one or two subsequent occasions Congress undertook to restrict the President's freedom in making removals, but without much success.

The tenure of office act (1867).

A notable instance occurred in 1867 when Congress passed the "tenure of office act" with the plain purpose of preventing President Andrew Johnson from removing various officers. It provided that any person holding a civil office to which he had been appointed with the confirmation of the Senate should remain in such office until his successor was in like manner appointed. This act was vetoed by the President but Congress passed it over his veto. Then President Johnson disregarded it as unconstitutional and this was one of the grounds upon which he was impeached. Subsequently the act was repealed and it is now conceded to have been an unconstitutional enactment, although that question was not decided by the Supreme Court prior to its repeal.

The Myers Case.

Meanwhile, in 1876, Congress passed another act which provided that certain classes of postmasters could not be removed from office by the President except with the advice and consent of the Senate. The constitutionality of this restriction did not get before the Supreme Court until President Wilson challenged it in 1920 by summarily removing a postmaster without senatorial concurrence. The dismissed postmaster carried the matter to the Supreme Court which held that the power to remove appointive officers was vested in the President as the nation's chief executive and could not be abridged by statute.[1]

Limitations upon the power of removal.

So it is now beyond question that the President has authority to remove appointive officials at his discretion. He does not need to give any reason, much less a good reason. But his power of removal does not extend to all appointive officials of whatever rank or status. Three classes of officeholders are exempt from dismissal without assigned cause, first, the judges of the federal courts, who

[1] See *above*, p. 184, *footnote*. For discussions of the general question see also E. S. Corwin, *The President's Removal Power under the Constitution* (New York, 1927), and James Hart, *Tenure of Office under the Constitution* (Baltimore, 1930).

can be removed by impeachment only. Second, there are certain independent commissioners, such as members of the federal trade commission, who cannot be removed except in accordance with such conditions as Congress may impose in establishing their offices.[1] Finally, there are those who secure appointment under civil service rules and hence may not be removed "except for such causes as will promote the efficiency of the service." This limitation is not necessarily a serious obstacle to a President who desires to make removals on political grounds, but in practice its spirit has been well respected.

Some patronage still remains.

The civil service laws have done much to mitigate the worst feature of the spoils system, namely, the ruthless dismissal of minor officers in order to provide places for party henchmen; but patronage is far from being wholly abolished. Many thousands of well-paid offices are still within the gift of the President. For these he is pressed upon all sides by office-seekers and their congressional friends; he is held responsible for appointments which of necessity he must make without any personal knowledge whatever, and is under constant temptation to use the appointing power in ways that will ensure his own renomination or promote the interests of his party. An unscrupulous President, if he chose to misuse without stint his powers of appointment and removal, could build up a personal and political machine of almost irresistible strength, for with the enormous growth in the functions of national government the appointing power has extended far beyond what could possibly have been foreseen when the foundations of the Republic were laid.

The Power of Pardon

An executive, not a judicial power.

Another presidential power, sometimes spoken of as quasi-judicial, but really executive in its origin and nature, is the power to "grant reprieves and pardons." The President may pardon any offense against the federal laws, but he has no authority to grant pardons for offenses against the laws of any state. A pardon may be either partial or complete, that is, conditions may be attached to it, or it may be granted in unconditional terms. A pardon, moreover, can be issued either before or after conviction. One limitation is imposed upon the President by the constitution, however, in that he can grant no pardon to anyone convicted by the process of impeachment. This embodies a lesson which the framers

[1] Rathbun-Humphrey *v.* U. S. (May 27, 1935).

of the constitution drew from England where an accused royal adviser, during the Stuart period, sometimes went to trial with the king's pardon already in his pocket. The power to pardon is linked with the power to reprieve, that is, the right to stay the enforcement of a penalty. A general pardon, granted to a large number of offenders, is called an amnesty. President Johnson issued two of them after the close of the Civil War to those who had borne arms for the South. The pardoning power, it need hardly be said, is not exercised by the President at his own caprice, but on the recommendation of the department of justice after the latter has made a full study of the case.

The Control of Foreign Relations

Diplomacy and treaties.

Another group of executive powers are those which relate to diplomacy, treaties, and the general handling of foreign affairs. The President is the official spokesman of the United States in all formal intercourse with foreign countries. He appoints (with the confirmation of the Senate) all American ambassadors and ministers to foreign capitals, and gives them their instructions on all important matters, usually through the secretary of state. Ambassadors who come to Washington from foreign lands are accredited to the President. In important negotiations the President may assume personal supervision of the communications sent to foreign governments, even to the extent of preparing them himself. This initiative in foreign affairs, which the President possesses without any restriction, is a very great power and at times amounts to absolute control.

Recognition.

The President determines, for example, whether the United States will "recognize" a newly established government and inaugurate diplomatic relations with it.[1] This giving or withholding of recognition may be a vital factor in determining whether the new government can maintain itself. By his quick recognition of Panama in 1903 President Roosevelt virtually assured the independence of that new republic. Congress might pass a joint resolution according recognition to a foreign government; it might even do this over the President's veto; but there is no way in which Congress could compel the President to make such a resolution effective by appointing an ambassador. So the power of recognition, as a practical matter, is wholly in the President's hands.

[1] Julius Goebel. *The Recognition Policy of the United States* (New York, 1915).

Limitations upon the diplomatic powers.

But there are limitations upon the diplomatic powers of the President. He can authorize the making of a treaty, but no treaty can go into effect until it has been approved by a two-thirds vote of the Senate.[1] He can break off diplomatic intercourse with another nation, and may take various other steps which are tantamount to a declaration of war; but a formal declaration of war can be made by Congress only. In practice, moreover, the President does not usually venture to direct the foreign relations of the United States without relying on the advice of others. He depends for guidance to some extent upon the state department, on his cabinet as a whole, and upon the leaders of his own party in both Houses of Congress. Moreover, he is always subject to the pressure of public opinion. In speaking of this matter one must always afford considerable scope for the interplay of men and circumstances. Some Presidents have made the handling of foreign affairs their special hobby, leaving very little to the discretion of the state department and rarely consulting the congressional leaders; while others have shown far less inclination to deal personally with diplomatic negotiations.[2]

Congress as a brake on the executive.

Nevertheless, the foreign policy of the nation has been largely moulded by its Presidents. Washington started the traditional policy of aloofness; Monroe promulgated the doctrine which has since borne his name; later Presidents have given direction to national policy as regards the "open door," the Panama Canal, Mexico, the Pacific, Russian recognition, and neutrality. This is not to say, however, that Congress has been without any voice in determining the direction of American foreign policy. No President can go very far without coming to Congress for money or for enabling legislation of some sort. Then Congress, if it chooses, may dictate its terms and reservations. We sometimes hear it said that President McKinley was responsible for the acquisition of the Philippine Islands. That is true; but it is equally true that he had to obtain from Congress the twenty million dollars stipulated in the treaty, and when Congress voted this money it assumed joint responsibility for the acquisition of the islands.

Do all agreements made by the President with other countries

[1] For a discussion of the Senate's power in relation to treaties see *below*, pp. 281–286.

[2] On this general subject see J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), and Quincy Wright, *The Control of American Foreign Relations* (New York, 1922).

require ratification by the Senate? No, there are various minor agreements which do not. For example, arrangements connected with the international postal service, or for the payment of routine claims, are concluded by what are known as "executive agreements," and these do not require ratification. But the line between a treaty and an executive agreement is by no means clear, and on one occasion President Theodore Roosevelt gained his end by making such an agreement after the Senate had refused to ratify substantially the same arrangement in the form of a treaty.

Executive agreements.

Powers in Relation to Lawmaking

Next among the powers of the President are those which have to do with lawmaking. One might judge from the reverence with which the statesmen of 1787 regarded the principle of separation of powers that the President would have been given no share in national legislation. But he was, in fact, endowed with very substantial powers in relation to the making of the national laws, and by usage these powers have been greatly expanded. Under the terms of the constitution he is entrusted with certain definite functions in relation to lawmaking,—for example, the right to call special sessions of Congress, to recommend the passage of any measure, to sign bills, or to veto them after they are passed.

The President and Congress.

Unlike the chief executive in most European states, the President does not call the national legislature together except in special session. The time for the beginning of regular sessions is fixed by law. Nor can he adjourn Congress unless the two Houses fail to agree between themselves as to the time of adjournment. The power to dissolve the legislative body before its term has expired does not exist in the United States. Congress finishes out its two-year term, no more, no less. In this respect the Congress of the United States differs from the British House of Commons which can be dissolved at any time by the crown on the advice of the prime minister. On the other hand the President does have a great deal to do with the length of congressional sessions. He can urge Congress to stay in session until important measures have been passed, and his urging can be reinforced by the threat of a special session, immediately after adjournment, if Congress goes home too soon. This is no empty threat, for the President may call either House, or both Houses, into special session at any time, and since

Restrictions upon the power to call and adjourn Congress.

members of Congress are paid by the year they get no additional compensation for this extra work.

Calling special sessions.

In issuing a proclamation calling for a special session the President states the purpose of the call and the matters to be dealt with at the special session, but Congress is not limited thereby. It can take up other matters if it so desires. Most of the state constitutions, by way of contrast, provide that when a state legislature is called into special session by the governor it may deal only with matters listed in the call. Special sessions of Congress have not been rare, nor on the other hand have they been frequent. A special session may last for a few days only or it may continue until the date for the next regular session arrives.

The President's messages.

The constitution, again, requires the President to "give to the Congress from time to time information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." This is the basis of the President's right to send messages to Congress, a right which has been freely used from the outset. Washington and John Adams delivered their recommendations by addressing Congress in person; but Jefferson began the practice of sending written messages to be read in both Houses by the clerks, and this plan was consistently followed until 1913, when President Wilson reverted to the earlier method. His successors have used both procedures, sometimes sending written communications and sometimes addressing Congress orally. A presidential message naturally makes a stronger impression on Congress when it is delivered in person, especially if the President is a forceful speaker and uses the radio to carry his words to the ears of the whole country. But whether written or spoken, these expressions of presidential opinion may come at any time and may deal with any subject. Invariably at the beginning of each congressional session there is a long message which deals with a variety of questions; then there are special messages in relation to particular subjects whenever the President sees fit to send them.

How far do they produce results?

But while the President may recommend many things, sometimes with great earnestness, it does not follow that Congress will follow these recommendations. A President's annual message is not, like the speech from the throne in England, an accurate forecast of what will go on the statute-book before the session ends. There the prime minister, who prepares the speech from the

throne, has a majority in the House of Commons ready to follow his leadership. The President may or may not have such support in Congress. And even when his own party controls both branches of Congress the President has no assurance that the senators and representatives will do what he advises. Party lines often break down, especially when measures relating to economic policy are being voted upon. The result is that projects of legislation, even when urgently recommended to Congress by the President, sometimes fail to receive acceptance. Conversely, bills which the President urges Congress to reject are sometimes passed by the votes of his own party allies.

Their influence on legislation.

Nevertheless, presidential recommendations always carry weight, and often prove to be the decisive factors in actuating Congress to pass or reject a measure. Sometimes a President's message is not merely an appeal to Congress, but to the whole country, as a means of stirring up public interest or making some feature of American policy clear to the whole world. This is proper enough, for the President is chosen by the entire country, represents the whole of it, and is its official spokesman. His words may be words of persuasion or dissuasion as the occasion requires. If he is popular with the country, and possesses its confidence, the reaction on Congress is sometimes both prompt and effective.

Executive pressure on the legislators.

The President, moreover, can go beyond the mere writing of messages. Usually there is in each branch of Congress some influential member who is understood to be the President's legislative adjutant. It is his business to see that support for the executive recommendations is properly mobilized. The President may even go so far as to have bills fully prepared and introduced into Congress as administration measures, although Congress is inclined to resent this way of doing things. Likewise he can invite influential senators and representatives to his executive offices, or to a White House luncheon, where he can reason with them, and even throw out a hint that those who do not stand by the administration cannot expect presidential favors or patronage. By the mere dropping of a word in the right place, moreover, he can sometimes start a backfire in the congressman's home district. And failing all else he can broadcast a fervent appeal to the country over a national network. There are endless ways in which the President can exert an influence with respect to measures of legislation in which he is interested.

He is a real power in lawmaking.

To say that the President is an executive officer and hence has nothing to do with lawmaking is, therefore, to disregard the realities. The President can be, and sometimes is, a more important factor in lawmaking than any dozen congressmen. It all depends upon two things, the political complexion of Congress and the personality of the nation's first citizen. Here, more than anywhere else, the function is the measure of the man. Herbert Hoover, who was opposed and more or less disliked by a strong faction of his own party, often found his advice rebuffed and his recommendations disregarded. Both Woodrow Wilson and Franklin Roosevelt, on the other hand, gave the country an impressive illustration of the way in which a chief executive, when favorably placed in relation to Congress and possessed of the requisite general popularity, can virtually write the laws with his own hand. The latter of these two Presidents sent legislation scurrying through Congress at a speed which made Europe's governments envious.

The legislative activity of the President usually arouses criticism.

But when a President tries to give momentum and direction to the work of Congress, his critics always cry out that he is usurping authority, upsetting the constitutional balance of powers, and trying to make himself a dictator. Yet it is merely that every strong President naturally seeks to overcome the most serious of all shortcomings in the American system of government, namely, the absence of provision for effective leadership in lawmaking. The constitution provides Congress with no recognized leader. It assumes that 531 legislators will somehow manage to lead themselves. Left alone they usually do lead themselves—into filibusters and deadlocks.

But it is justifiable and even essential.

Now it is one of the axioms of government that there must be vigorous leadership if the work of lawmaking is to be performed in orderly fashion. To desire the end is to tolerate the means. The President can hardly be kept from assuming the rôle of an American prime minister if there is nobody else in a position to play that essential part in public administration. The people look to the President rather than to Congress for the redemption of pledges made in the platform of his party. He must, therefore, be active in promoting legislation or he will be forced to bear the onus of failing to keep faith with the country. This is an outgrowth of the President's status as a party leader, a matter to be discussed presently. Meanwhile it is worth while to note the significant fact that no President during the past fifty years has ab-

dicated the function of legislative leadership without thereby sacrificing a reputation for efficiency.

Another phase of the President's legislative powers: the system of "executive orders."

In addition to the exercise of influence upon Congress, the President virtually legislates on his own account. This is done by the issue of "executive orders," which have virtually the force of law.[1] The power to issue such orders is sometimes known as the ordinance power and its existence points to an inherent shortcoming in statutory law. In principle statutes should be both comprehensive and specific, that is, both broad enough and definite enough to cover all cases that may arise; but as a practical matter this is not always possible. Take the federal income tax law, for example. To specify every detail relating to the figuring of exemptions, deductions, allowances, depreciations, capital gains and losses, consolidated returns, and so on would expand the law to a thousand pages. Or take the civil service law as another example. A whole volume would be required to include within its scope all the provisions relating to the classification of positions, the rating of applicants, the nature of the examinations, and the methods of certifying the results. So Congress has adopted the practice of sometimes omitting minor details from the text of important laws and providing that these shall be supplied by executive order. The President (or the heads of departments with his approval) then frame executive regulations which are issued to supplement the laws. The courts have held that this practice, when kept within reasonable bounds, does not constitute a delegation of legislative power by Congress.

What executive orders deal with.

Executive orders regulate the details of administration in many important branches of government—for example, in the postal and immigration service, the collection of customs duties, as well as in the patent, pension, and land offices. In connection with the emergency legislation of 1933–1935 there was a great expansion in this procedure. In the case of the national industrial recovery act the amount of discretion given to the President was so extensive that the Supreme Court held it to be a delegation of legislative power and hence unconstitutional. Let it be made clear, however, that this decision in the Schechter Case did not condemn the practice of giving discretionary power to the execu-

[1] In 1935 Congress passed a law (the federal register act) requiring that all executive orders, decrees and proclamations having general applicability and legal effect must be published in an official *Register* which is issued daily.

tive, but only the practice of giving too much of it. Executive orders and regulations do not enact, amend, or repeal any law, but merely supplement, elaborate, and apply the provisions of existing congressional statutes. In effect, of course, they sometimes do more than they profess to do. Occasionally they give a twist to legislation which Congress did not intend. For all the implications of a law never appear in its text. Much depends on the procedure by which its provisions are applied, hence the power to determine procedure by executive order becomes in effect a form of lawmaking authority. At any rate, here is a confession that under the complex economic and social conditions of today a government cannot remain exclusively a "government of laws." It must be to some extent a government of men with power to supplement the laws by executive action.

The Veto Power

Constitutional basis of the veto.

The foregoing are the positive powers of the President in lawmaking. But he also possesses a negative or restraining power of even greater importance, known as the veto power. The scope and nature of this power cannot be more succinctly expressed than by quoting the exact words of the constitution:

> "Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law." [1]

The qualified veto is a compromise.

How did the framers of the constitution come to adopt this provision, which is a native-born American contribution to the practice of government? They devised it in accordance with their policy of choosing a middle course between two extremes. On the

[1] Article I, Section 7.

one hand they were not prepared to give the President an absolute veto such as governors had possessed in colonial days. On the other hand they did not think it proper that the laws should be made in sheer defiance of the President's rights or wishes. Experience with parliament in colonial days had shown that a legislature could be quite as tyrannical as a monarch. All the lessons of history, in fact, seemed to demonstrate that no legislative body could be kept within its own sphere of action by any "mere parchment delineation of boundaries." [1] The executive ought, therefore, to be given some sort of weapon to wield in its own defense, and the "qualified veto" was devised as a compromise between an absolute veto and no veto at all. It was agreed upon as establishing what Alexander Hamilton termed "a salutary check upon the legislative body," and at the same time a "shield to the executive." Apparently the framers of the constitution looked upon the President's veto as a legislative rather than as an executive function, for they inserted it in that part of the constitution which relates to the organization and powers of Congress.[2]

The three courses open to a President.

If you read carefully the veto clause of the constitution, as above quoted, you will see that any one of four things may happen when a bill or joint resolution of Congress reaches the presidential desk. *First*, he may sign it. That is what he does in the great majority of cases. *Second*, he may return it unsigned, within the space of ten days, to the branch of Congress in which it originated. The constitution requires that in returning it he shall state his objections, but these need not be specific. A mere statement that the measure is unwise or untimely or extravagant is enough. At any rate when the measure comes back to Congress it is again voted upon, and if adopted in each House by at least a two-thirds majority it becomes a law notwithstanding the President's disapproval. In popular parlance it is "passed over his veto." *Third*, the President may neither sign the measure nor return it. He may let it lie on his desk until the ten-day limit has expired. Thereupon the bill becomes a law without his signature unless Congress has meanwhile adjourned. In that case (and this is the *fourth* eventuality), it does not become a law. It gets what is commonly known as "the pocket veto."

[1] *The Federalist*, No. 73.

[2] "It has been suggested by some that the veto power is executive. I do not quite see how. . . . The character of the veto power is purely legislative." W. H. Taft, *Our Chief Magistrate and His Powers* (New York, 1916), p. 14.

The veto procedure in practice.

A few words of explanation should be added with reference to these several methods of settling the fate of bills which come to the President's desk. The ten days do not include Sundays, nor does the time begin to run until the bill actually reaches the President. When President Wilson was in France, attending the peace conference at the close of the World War, the bills did not reach him, in some instances, for more than ten days after they had passed both Houses. As a rule the President quickly signs those bills which he approves and vetoes those which he disapproves, but if his mind is not strongly set in either direction he may ignore the measure altogether. In this way, when ten days expire, he throws the whole responsibility upon Congress. Many bills perish by way of the pocket veto at every session of Congress. This is because large numbers of measures drag along on the congressional calendar until the closing days of the session and are then rushed through their final stages. The President gets them in batches and it is sometimes impossible for him to give each bill the consideration which it deserves. So he takes the ones which he approves and signs them, leaving the rest to die a natural death if Congress adjourns within ten days, as it sometimes does. While the wording of the constitution might seem to imply that the President cannot sign a bill after Congress has ended its session, this is not necessarily the case. President Wilson signed a number of bills after the adjournment of Congress in 1920 and the Supreme Court has recently ruled that such action is within the President's power.[1]

Veto power does not apply to proposed constitutional amendments.

It ought to be mentioned that proposed amendments to the constitution, when they have passed Congress by a two-thirds vote in both Houses, are not presented to the President for his signature and hence cannot be vetoed by him. The same is true of "concurrent" resolutions which, when passed by both Houses, do not have the force of law but are mere expressions of congressional opinion. But joint resolutions, which are virtually the same as bills, come within the scope of the veto provision.

Extent to which the veto power has been used.

Was it intended that the veto power of the President should be used freely or only on rare occasions? Alexander Hamilton predicted that it would "generally be employed with great caution." And for a time he seemed to be right. Washington, Adams, Jeffer-

[1] Edwards *v.* U. S., 286 U. S. 482 (1932). For a full discussion see the article by Lindsay Rogers on "The Power of the President to Sign Bills after Congress has Adjourned" in the *Yale Law Journal*, Vol. XXX, pp. 1 ff. (1920).

son, and Madison, the four Presidents of the constitutional group, used their veto power sparingly. During the first forty years of the Republic only nine bills were vetoed, an average of less than one for each administration. And in every case, during these four decades, the veto was based upon the alleged unconstitutionality of the measure or some other inherent defect, not upon the President's personal objection to it. Not one of these bills, moreover, was passed over the President's veto.

Jackson and Johnson.

But Andrew Jackson set a new record in this as in several other things by vetoing nearly as many bills as all his predecessors put together. This was because he interpreted the veto power in a way quite different from the others. Their attitude had been one of non-interference with the lawmaking authority of Congress except where intervention seemed necessary to prevent an unconstitutional or unworkable law from going on the statute-book. But Jackson took a more aggressive stand, and used the veto to stay the hand of Congress whenever its action seemed to run counter to his own political or personal views. This action was bitterly criticized as an usurpation; although the constitution reads "if he approve he shall sign it, but if not he shall return it," and these words presumably mean what they say. At any rate the Jacksonian point of view eventually gained acceptance. From Jackson's time until after the Civil War, however, vetoes did not increase, even though the President sometimes had a refractory Congress on his hands. President Johnson during his quarrel with the lawmakers swung the axe right and left, but not to much avail because Congress regularly passed its measures over his veto.

Grover Cleveland.

After 1867 the only President to use the veto power unsparingly was Grover Cleveland, who applied it to a large number of private pension bills (over two hundred of them), but all of the Presidents since his time have employed it more freely than it was used in the first quarter of the nineteenth century. They have assumed the duty of vetoing any measure that seemed to be unwise or inexpedient. What was intended, therefore, to be a weapon of executive self-defense has developed into an implement for guiding and directing the lawmaking authority of the nation. It has been expanded into a general revising power, applicable to all measures of whatever sort. Enabling each President to set up his own judgment against that of the legislators, it has virtually developed the presidency into a third chamber of Congress, thus making the

chief executive a far more active figure in legislation than he was originally intended to be.[1]

Merits and defects of the veto system.

Foreign students of government sometimes ask whether the qualified veto has, on the whole, served a good purpose. Hamilton's prediction that vetoes would be relatively few has not been entirely fulfilled, nevertheless if one counts only the important measures (disregarding private pension bills and the like) the vetoes do not average one per year. Ninety-nine per cent of all the important measures passed by Congress have obtained the presidential signature without delay or evasion. This means that the veto power has not been generally abused, but has been exercised, for the most part, with restraint. More often than not, public opinion has been with the President in the use of the veto and has compelled Congress to back down. Now and then, on the other hand, the presidential veto has been overridden by the necessary two-thirds majority.

Veto power does not extend to items in a measure.

One improvement in the American veto system has been strongly urged, namely, that the President be allowed to strike out single items in an appropriation bill. This power he does not now possess. He must either veto the bill as a whole or leave it as it stands. In consequence he must often give his consent to individual projects of expenditure which he does not approve; otherwise the entire bill would fail. Appropriation bills usually include hundreds of items, and all of them, save a very few, may be entirely proper. These few may be pernicious and wasteful, yet the President must take the chaff with the wheat. Otherwise he will be left without funds with which to carry on some important branch of administration.

Should it be made to do so?

Many wasteful expenditures have gone past the most vigilant Presidents in this way. A constitutional amendment giving the executive power to veto individual items would serve a good purpose in some ways; on the other hand, it would enormously increase the influence of the President over Congress, giving him a new form of patronage almost equal to that which he now possesses through the exercise of his appointing power. Every senator and representative is greatly interested in securing appropriations for use in his own state or district. He is, in fact, more interested in this than in almost anything else on the congressional calendar, because he must not come home empty-handed if he desires reëlection.

[1] E. C. Mason, *The Veto Power* (Boston, 1890), gives a full account of the use and abuse of the veto power during the first century of its history.

Now the partial veto, in the hands of a vindictive President, could readily be used to penalize opposition and reward support in Congress. Under such conditions there are few members of either House who would venture to stand out against the chief executive, in which case the remedy might prove worse than the existing evil.[1]

Threats of a veto not uncommon and have their effect.

The President's influence upon lawmaking may be exerted not only by actually using his veto power, but by threatening to use it. When a measure is in its earlier stages, even before it has been reported to Congress by a committee, he can make his disapproval known. This he may do openly, by a public announcement, or he may prefer to speak his mind privately to the leaders of his party in Congress. The certainty that a bill will fail to receive the President's signature sometimes puts a damper on congressional enthusiasm for it. On the other hand, Congress occasionally lets a measure go through with the hope and expectation that it will be vetoed, thus saddling upon the White House whatever odium may come from its rejection. But one must not take the exception for the rule. Congress does not ordinarily pass measures to which the President is opposed. The two arms of the national government normally work in coöperation and this is particularly true when both are controlled by the same political party.

Conclusions on the President's powers in relation to lawmaking.

Surveying as a whole the President's powers in relation to lawmaking, it will be seen that whatever the purpose of the constitution may originally have been, the actual influence now exerted by the executive in matters of federal legislation is very extensive. He recommends legislation to Congress by message and can support his recommendations by the use of political and personal pressure. Likewise he can use the federal patronage, and his prestige as a party leader, if need be, to make his wishes prevail. As Woodrow Wilson once put it: "He is at liberty to be as big a man as he can." In a restraining sense, on the other hand, the President's influence on legislation is exerted through the use of his veto power or by threats of using it. Putting these two forms of influence together, it is more extensive than that possessed by the chief executive in any other country.

Military Powers

In all countries the chief of state is nominally the head of the armed forces. By express provision of the constitution the Pres-

[1] The evil has been considerably diminished by the adoption of the national budget system. See *below*, pp. 371–381.

The commander-in-chief.

ident is commander-in-chief of the army and navy, which includes the armed forces of the states when called into the federal service. He commissions all officers in the army and navy of the United States; but officers of the militia, when not in the federal service, are appointed as the laws of their several states may direct.[1] Congress determines the size of the army and navy, and votes the appropriations for national defense; but the expenditure of these funds is in the hands of the war and navy departments, both of which are directly under the President's control. Congress also makes the general laws under which the military and naval forces are organized and maintained, although a large discretion in the making of detailed regulations is left with the President and his advisers, particularly in time of war.

Their scope and importance.

The President directs the movement of the nation's armed forces and by the exercise of this authority may bring about a state of war, leaving Congress no option but to recognize an accomplished fact by the issue of a formal declaration. He may order naval vessels to land marines in a foreign port and seize the customhouse, as President Wilson did at Vera Cruz. Ordinarily such an act would lead to war, although it did not do so in that case. Under his war powers, moreover, the President may provide for the government of conquered territory until Congress establishes a permanent form of administration. To this end he appoints officials in the occupied territory and sets up provisional courts, as was done in the Philippines from 1898 to 1901. No one has ever accurately defined the powers of the President as commander-in-chief, and no court has ever placed any fixed limit upon them. In war time they expand with the scope of the emergency and potentially are as great as those exercised in bygone days by Oliver Cromwell or Napoleon Bonaparte. This is as it should be, for war demands "the incisive application of a single will."

The maintenance of domestic peace.

In the matter of guaranteeing to each of the states a republican form of government, protecting them from invasion, and putting down internal disorders, the constitution entrusts powers to the federal government which the President usually exercises on its behalf. In the event of an invasion or any attempt to supplant the republican form of government the intervention may take place without any request from the state concerned. But in the case of

[1] C. A. Berdahl, *The War Powers of the Executive in the United States* (Urbana, 1921). See also *below*, pp. 461–462.

domestic violence the federal government may not step in unless its assistance is requested by the authorities of the state in which the disorder has arisen. This request is made by the state legislature if in session; but if the legislature be not in session, it is made by the governor.

Federal intervention.

When, however, the disorders within any state obstruct some function of the federal government, such as the collection of the revenues or the carrying of the mails, the President may intervene without waiting for any invitation from the state authorities. President Cleveland, in 1894, sent federal troops into Illinois, despite the opposition of the authorities in that state, to secure the free passage of the mails and of interstate commerce during a railway strike. The Supreme Court upheld the exercise of this authority in a famous decision, one paragraph of which may well be quoted because of its firm and comprehensive language:

The Debs Case.

> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the services of the nation to compel obedience to its laws." [1]

Powers as a Party Leader

The President's official influence.

All the foregoing powers are vested in the President by the constitution and the laws of the United States as interpreted by the courts. But there is another kind of authority, or, to speak more accurately, a form of official influence, which the President does not obtain from this source but possesses as leader-in-chief of his own political party. The President is a party man, elected as such. The members of his cabinet are fellow partisans. His party leaders in Congress must work in reasonable harmony with their chief, otherwise a common program cannot be carried out and the party is likely to go down to defeat at the next election. The President is therefore, unable to escape responsibility for what his friends in Congress may do or fail to do.

The White House, moreover, is the biggest pulpit in the country. Millions of people look to it for guidance on the issues that are

[1] *In re* Debs, 158 U. S. 564.

being debated in Congress. They want the President to tell them what he thinks they ought to think. These millions of citizens do not care a rap about the principle of checks and balances. They do not look upon their government as an affair of watertight compartments. They remember only that they voted for a President at the last election in the expectation that he would carry out a certain program, and they want to know whether he is doing it.

Difficulties of a President's position.

This makes the President's task a difficult one at best, and sometimes an impossible one. He has been elected on a party platform containing many definite pledges. Perhaps he was himself responsible for getting these pledges into the platform and regards it as his duty to see that they are fulfilled. But this can only be done when Congress is ready to coöperate with him, which it sometimes is not. In that event there are two alternatives open to a President, neither of them altogether agreeable. He may assail Congress in his public utterances, and appeal to the public opinion of the country against it, hoping to apply pressure in that way. President Theodore Roosevelt used this method freely and for so doing he was called a usurper, a dictator, a boss, a man of lawless mentality.

Or, as the other alternative, the President may go out with an olive branch in his hand and meet Congress halfway, conceding some things for the sake of getting others. Then the country is likely to complain that he is spineless, a trimmer, a weakling. He will be called a time-server, or a sheep in lion's skin arrayed. Blessed are the peacemakers in politics for they shall be among the cursed of men! The trouble is that the people want the President to be a prime minister and then get cross with him when he does it. The average voter is always grumbling about leadership; when there is little of it he wants more, and when there is plenty of it he demands less.

The constitution does not give the President the authority of a national leader.

The instinct of the country is for unified action. Woodrow Wilson once wrote that "it craves a single leader." [1] But the Constitution of the United States did not contemplate that the country should have a single leader, and no President can assume that supremacy without trenching upon the independence of the national legislature. Thus does the country's instinct, which is sound, conflict with the frame of government which in this particular is defective. Mr. Wilson, two years before he became President, expressed the conviction that "the personal force of the President is perfectly

[1] *Constitutional Government in the United States* (New York, 1911), p. 68.

constitutional to any extent to which he chooses to exercise it." [1] That conviction he undertook to apply during his eight years in office. But the enthusiasm with which the country, in 1920, welcomed a return to the traditional method of government by dickers and compromise would seem to indicate that it was not then reconciled to any plan of government by the personal force of the President. President Franklin Roosevelt, a disciple of Wilson, went even farther than his prototype had done. In a great economic emergency he proceeded to dominate the whole program of Congress and once more there were outcries concerning the march to a dictatorship. Whether the country will eventually swing back to the time-honored "hands-off Congress" scheme of government is something that only the future can disclose.

Strong presidents and weak ones.

The swing of the pendulum from men of strong personality to the very antitheses of such men has been a noteworthy feature in the presidential campaigns of the past fifty years. Chester A. Arthur was replaced by the rugged Grover Cleveland in 1885. Cleveland gave way to the colorless Benjamin Harrison for four years and then came back for a second term. He passed the scepter to William McKinley in 1897 and this mild Ohioan made way, in turn, for Theodore Roosevelt. The dynamic Rooseveltian régime was succeeded by Taft's four years of legalism and compromise. Then came Woodrow Wilson with a measure of assertive leadership which no President since Lincoln had ventured to assume. Eight years of it satiated the electorate. In 1920 the people avowed themselves weary of presidential government by electing Warren G. Harding to the White House. For a couple of years he smiled benignly in the front parlor while scalawags were raiding the pantry. Calvin Coolidge then took his place and let the ship-of-state drift along with the currents of industrial prosperity until 1929. He rode in the procession of progress with his face turned backwards. His successor, President Hoover, was by professional training, executive experience, personal competence and individual integrity one of the best-qualified men ever elected to the presidential office, but hardly had he become settled in the executive mansion before an economic typhoon appeared on the horizon. Within three years it gained a force that carried him (and would have carried any other President) out of office at the election of 1932.

[1] *Ibid.*, pp. 71–72.

The transition era of today.

The country, gripped from end to end by a fear complex, called for a new deal, and the election of Franklin Roosevelt ushered in an era of revolutionary changes in American politics, the like of which the nation had not witnessed since the days of Andrew Jackson, a hundred years earlier. Never in the entire history of the American Union has the government of the nation been so completely under the domination of a single will as it proved to be during this second Rooseveltian interlude. When the next swing of the pendulum will occur, in what direction it will go, and for what distance are questions which cannot be answered without entering the realm of prophecy—which is not the business of political scientists, or scientists of any other variety.

This, however, can safely be said. All through the centuries in which human opinion has been articulate the public temper has travelled from weak leadership to strong, and from conservatism to liberalism, but always with a return ticket. The inclination to regularity in its lurches back and forth is greater than most casual observers of the political scene are apt to realize. No prediction can be safer than that political momentum, when carried far in any direction, will eventually exhaust itself. Then there is a revulsion, the force of which is almost directly proportioned to the strength of the preceding swing. This is a law of politics and mechanics alike. Interludes of liberalism are essential to political progress, but they are disintegrating in their immediate effects upon government, and hence must be followed by periods of integration. Wise men are they who keep their eyes on the pendulum and detect its obedience to a fundamental law of politics.

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CHAPTER XIII

THE CABINET AND THE DEPARTMENTS

Tried by their own aims, the founders of the United States were wise in excluding the ministers from Congress.—*Walter Bagehot.*

The principles of a free constitution are irrecoverably lost when the legislative power is dominated by the executive.—*Edward Gibbon.*

The genesis of the cabinet.

The practice of surrounding the chief executive with a circle of advisers or ministers, chosen by himself, is one of the oldest in the history of government. It appeared in England under the Anglo-Saxon kings and became recognized as a regular feature in the government of the realm under the Normans. In due course this body of royal advisers became the privy council, out of which the present British cabinet arose. Today it serves as the real executive organ of the United Kingdom, the great standing committee of parliament.

Its lack of legal basis in both England and in the United States.

In one sense the English and American cabinets are alike. Neither has any constitutional foundation. In England the cabinet rests on custom alone; and in the United States the same thing is true, for the constitution makes no provision for a cabinet and merely refers incidentally to heads of departments. But aside from this similarity in the mutual lack of constitutional basis the cabinets of the two countries are different in every important respect. Without the cabinet the whole scheme of English government would fail to function, for it has become the pivot on which all else now revolves. The cabinet of the United States plays no such essential part in the government of the nation. The wheels of federal government would run their rounds at the usual speed if the heads of departments formed no organized group and if no cabinet meetings were held from one end of the year to the other.

The framers of the constitution did not regard a cabinet as essential.

The builders of the American federal system were well acquainted with the work of the governors' councils which had existed in some of the colonies before the Revolution. But they were not favorably impressed and hence rejected a proposal to include provision for a council of state in the new constitution. On the other hand they realized that the President could not himself do all the

But made provision in the constitution for heads of departments.

administrative work that the Union would require, so they merely assumed that he would place subordinates in charge of the various departments, and specified neither what these departments should be nor what authority they should exercise.

Departments which have been established by Congress.

"The President may require the opinion in writing of the principal officer in each of the executive departments." That is all the constitution has to say about the President's relation to his chief executive advisers. Congress establishes the departments; then the President selects a principal officer, or department head for each. Three departments were established at the very first congressional session in 1789, namely the state, treasury, and war departments. An attorney-general and a postmaster-general were also provided in the same year but their offices did not at first rank as regular departments. They became departments later and Congress has from time to time added others: the navy in 1798, the interior in 1849, agriculture in 1889, commerce in 1903, and labor in 1913, making ten regular departments in all. The heads of these ten departments are by custom entitled to membership in the cabinet.

Status of these department heads.

The head of each department (secretary of state, attorney-general, postmaster-general, as the case may be) is appointed by the President with the consent of the Senate. But this consent, as has already been stated, is almost never withheld.[1] The President announces his selections immediately after his inauguration, and the appointees usually hold their posts till the end of his term, although they may be removed at any time. Removals in the ordinary sense are rare, but resignations because of failure to work in harmony with the President have not been uncommon. It is clearly understood that every member of the cabinet must be loyal to the President in all things, and that if any serious estrangement arises the resignation of the dissenter should be submitted without delay. The cabinet must have at all times an outward solidarity.

How selected.

In selecting the ten heads of departments who form his cabinet the President is not limited either by the constitution or laws in the range of his choice. He may select whom he pleases. But if he chooses a senator or a member of the House of Representatives, the appointee can no longer sit in Congress. Likewise there are some practical considerations which to some extent influence the President in making his selections. For one thing he usually keeps within

[1] See *above*, pp. 186–187.

his own political party. Washington endeavored to select his cabinet from among the men of different political affiliations; for that reason he made Thomas Jefferson secretary of state and Alexander Hamilton secretary of the treasury. Both were admirably qualified for their respective offices, but they stood widely apart in their political views and were frequently at odds, much to Washington's embarrassment. So the practice of choosing the cabinet from the President's own political party was adopted as a means of ensuring harmony and it has ever since been followed except in a few scattered instances.

This does not mean, however, that the President selects the members of his cabinet from among the party leaders. Some of them may be of this rank, but for the most part the choice has fallen upon men who have not been party chieftains in the usual sense of the term. Occasionally, moreover, the President may include men who have not been actively identified with his own party at all and who may have voted at times with the opposing party. The cabinet is no longer regarded as a board of strategy for the President's party organization. On the other hand it is desirable to have at least one seasoned party warhorse in the cabinet and frequently a man of this type is appointed to the position of postmaster-general.

Geographical and other considerations.

Within the ranks of the party, moreover, the selections naturally have to be made with an eye to geographical considerations. A President cannot wisely draw his entire cabinet from the North or the South, the East or the West. If he did there would be resentment in those regions which are overlooked. On the other hand, there is no obligation to distribute cabinet positions on anything like a proportional basis. Sometimes a single large state is called upon for two, or even three, members of the cabinet. Regard must also be paid to the desirability of conciliating different factions of the party, if such there be. And some of those who have been the President's right-hand men during his campaigns are sure to expect recognition. It was generally believed, for example, that President Wilson's selection of Mr. William Jennings Bryan as secretary of state in 1913 was dictated more by gratitude for past helpfulness than by any sense of political hopefulness. Personal friendship also counts for something, and occasionally for a good deal. Every cabinet during the past fifty years has contained at least one or two members who owed their inclusion

to the fact that they were presidential intimates of long standing. Finally, a selection is sometimes dictated by the sole reason that the appointee is peculiarly well fitted by training or experience for the headship of a particular department, all other considerations being waved aside.

Special fitness and experience.

In certain portions of the public mind there is an idea that all the members of the cabinet ought to be experts—that the secretary of the treasury ought to be a past master in finance, the secretary of agriculture a "dirt farmer," and the secretary of labor someone with a union card in his pocket. This idea is not in accord with the philosophy of democratic government. The secretary of agriculture is not supposed to serve the farmers of the United States but the people of the United States. Expertness is needed in all the executive departments, but not necessarily at the head of it. Otherwise there would be every reason for picking the secretary of war from among the generals and the secretary of the navy from among the admirals. That is what they do in Latin-American countries, but the United States has avoided such a course, and wisely so. Apart from the attorney-general, who from the nature of his duties ought to be a lawyer, there is no good reason for insisting upon technical proficiency at the head of any department and allowing this to outweigh general qualifications.

A mistaken popular idea concerning the cabinet.

For it should always be remembered that the cabinet is a circle of advisers, and that the President has a right to have his most trusted counsellors in it. This is something which the critics of a new administration often overlook. The cabinet is not intended to be a representative body, or a professional group, or a check upon the President. It is intended to be what he chooses to make it. Its relation to him is designed to be personal, and according to the theory of American government it cannot be too much so, for the President bears all the responsibility and the cabinet bears none. He cannot shelter himself behind his advisers as kings and emperors are accustomed to do.

A variegated group.

Accordingly, the cabinet of the United States is likely to be a variegated group, in the making of which partyism, geography, conciliation, compromise, gratitude, political strategy, administrative skill, and personal intimacy all play a varying share. A President is known by the cabinet he makes. And since no two presidents are alike, their cabinets are bound to differ. President Wilson chose men (or tried to choose men) whose "minds ran

along with his own." President Theodore Roosevelt acquired a cabinet with a variety of minds, but by force of his assertive personality soon had them all marching in line with him. President Coolidge inherited a cabinet from his predecessor, made few changes in it, and deferred a good deal to its collective judgment. President Hoover constructed his group with an eye to the administrative competence of the members, paying little regard to other considerations. President Franklin Roosevelt tried to organize a group which would represent both the conservative and liberal elements of his party, but with the latter in preponderance. For advisory assistance, however, he has drawn considerably upon sources outside the cabinet altogether. Some presidents think of cabinet-members as advisers, others as heads of departments. Some want men of ideas, while others prefer men of affairs. A few have tried to keep both types in the circle.

The Cabinet's Functions

Powers and functions of the heads of departments:

In discussing the powers and duties of the cabinet it is therefore advisable to make a distinction between *advisory* functions which are performed by the cabinet as a whole, and *administrative* functions which are performed by the members of the cabinet individually, as heads of their own departments. Both are important, but their relative importance depends upon the character of the President. If he is a self-confident man the degree of his dependence upon the cabinet as an advisory body will be correspondingly less.

1. As a body.

For it has already been pointed out that there is nothing which can be done with the cabinet's advice which cannot be done without it if the President desires. In other words, the federal cabinet is merely a group of high officials whom the President may or may not call together for consultation as he chooses. As a matter of usage, however, its members meet twice a week (on Tuesdays and Fridays) during sessions of Congress and find plenty to do at these meetings. What is there to do? Briefly the cabinet discusses whatever the President sees fit to lay before it, and gives its advice when he asks for it. Sometimes the President has already made up his mind on some question and merely brings it before the cabinet for its information, or for suggestions as to details.

Lincoln, for example, did not consult his cabinet on the Eman-

Relations with the President.

cipation Proclamation until he had himself decided that it ought to be issued. Andrew Jackson, a generation earlier, found his cabinet an encumbrance upon his freedom of decision and for nearly two years called no meetings at all. Four or five members of the cabinet virtually controlled President Buchanan during the latter part of his term. Buchanan became a sort of regent, while the cabinet conducted the government of the country. Franklin Pierce always sought cabinet advice and followed it. General Grant, on the other hand, carried his military traditions into the White House and dealt with members of his cabinet as though they were second lieutenants, whose duty it was to carry out the orders of their captain. Grover Cleveland, imperious though he was in some ways, had a high respect for the judgment of his cabinet members and followed their counsel on most matters. Theodore Roosevelt sometimes acted first and explained afterwards; while the members of Woodrow Wilson's cabinet occasionally got their first information about presidential action from the newspapers.

Its advice is not always taken.

But even the most strong-willed President finds it desirable to submit important problems to his cabinet for discussion. Questions are not put to a vote for the reason that the President's own vote would outweigh the other ten; but the drift of cabinet opinion can be gleaned from the discussion and the President's point of view is influenced thereby. Naturally so, for it is a discussion participated in by men whom the President has himself chosen as sensible advisers. If their collective counsel is not worth heeding, why should he bring them together? But in the last analysis a President must hold himself free to act in disregard of advice given him by the cabinet or by any member of it. McKinley, for example, declined to follow the advice of Secretary Hay as respects the acquisition of the Philippines. Today there are few who would deny that Hay was right and McKinley wrong. President Wilson, during the World War and in the peace negotiations, treated the advice of his two secretaries of state, Bryan and Lansing, with courteous indifference.

Cabinet meetings.

In addition to its twice-a-week meetings the cabinet may be summoned for special meetings. The members sit at an oblong table in order of seniority, the President at the head, the secretary of state on his right, the secretary of the treasury on his left, and so on down both sides of the table. If the head of a department is absent from Washington his undersecretary, or an assistant secre-

tary, may be asked to attend in his place. Meetings of the cabinet are strictly secret; no formal record of the discussions being ever kept and no summary of the proceedings given to the public. Whether the President asks, receives, accepts, or disregards advice from his cabinet is never known, save in rare instances, and then long after the event has passed. It would be a grave discourtesy to the President were any member of the cabinet to make public anything that transpires around the oblong table. If there is anything to announce, the President gives it out as his own action and not as a decision of the cabinet.

Their value.

The best service performed by frequent cabinet meetings is that of avoiding conflicts or misunderstandings among the several departments, thus enabling the administration to put unity into its program. To this end the President usually calls upon the members, one after another, to present any matter that seems to concern the interests of more than one department or raises some issue of general policy. If the President is sending a message to Congress he often reads it to the cabinet in advance. The cabinet has no rules of debate; no motions are made or amended, and no speeches are delivered. Everything is done with proper dignity, but in an informal way, and always with close attention to the business in hand. But if the President is a good *raconteur*, as Lincoln and Theodore Roosevelt were, he will relieve the routine by punctuating it with stories which may or may not be relevant to the discussion.

2. As individuals.

More vital than the functions of the cabinet as a body are those of its members as individuals, as heads of departments. Every head of a department is responsible to the President and is under his direction at all times, but in practice each is allowed a considerable range of independence. This must necessarily be the case, for if everything could be supervised directly by the President himself there would be no need for department heads at all. Even in a single department there is always more to do than the official at its head can personally attend to, hence each department has one or more assistant secretaries (and sometimes an undersecretary) who assume part of the work which would be done by the chief if there were less of it to do.

Each department, moreover, is divided into bureaus under bureau chiefs or commissioners. The bureaus, in turn, are split into smaller units called divisions. But this disintegration is not

The disintegration of departmental machinery.

uniform in all departments. Some have divisions above the bureaus and some have branches, offices, commissions, and subdivisions, related to each other in a way that is very confusing to an outsider. The internal organization of each department is usually prescribed by law; it is not left, as in most other countries, to be arranged by presidential decree or executive order. It has grown up step by step over a long term of years and reflects the idiosyncrasies of successive Congresses. On more than one occasion the President has been given power to do a certain amount of consolidating and rearranging, but the administrative structure remains a badly tangled mass.

The elaboration of independent boards and offices.

The scope of work handled by these bureaus, divisions, and other subordinate branches is very extensive. No head of a department, much less a President, can keep the run of it. With the expanding functions of federal government, moreover, it is growing by leaps and bounds. The administrative machinery at Washington is now a dozen times more complex than it was a generation ago. Not only has the work of the various departments been divided, redivided, and subdivided among subordinate offices, but many new administrative boards and commissions, some of them exercising functions of the highest importance, such as the interstate commerce commission, the federal trade commission, the civil service commission, the tariff commission, the federal communications commission, the federal farm board, the veterans' administration, the reconstruction finance corporation, the home owners' loan corporation, the securities and exchange commission, the public works administration, and a dozen others are working outside the purview of the ten regular departments. Of these, however, more will be said in the next chapter.

General work of the departments.

The functions of each department are defined in part by law and in part by executive orders. Within these bounds the head of the department has the right to make rules for the conduct of departmental business. This is done by issuing departmental orders and regulations, some of which are elaborate documents, full of detailed provisions. The regulations of the treasury department relating to the collection of the revenues, for example, would fill a whole volume. The same is true of the regulations which have been promulgated in connection with the granting of patents, and most people are familiar with that dog-eared booklet known as the postal regulations which the clerk at the post office

window thumbs over whenever he is asked a question. By glancing through a copy of these regulations one may obtain some idea of the vast and varied list of functions which these national departments are expected to perform. A complete list of them is nowhere to be found, nor would such a tabulation be accurate a few months after it had been compiled, for changes are being made continually.[1]

Functions of a department head.

Hence it would be impossible, in a single paragraph, to give more than the barest outline of what the head of a department at Washington is supposed to do in the course of his day's work. He makes appointments to various junior positions, for Congress has put a good deal of appointing power directly into his hands. He approves and issues the regulations which have been mentioned in the preceding paragraph. He must deal with all manner of complaints against heads of bureaus and other officials in his department; he hears and determines appeals from their rulings; he listens to senators and congressmen who come with multifarious suggestions, recommendations, and requests for favors. He goes before committees of Congress when called upon, and supervises the preparation of any data that either Congress or the President may request. All important questions of departmental policy come to his desk for decision, and to make an intelligent decision he must wade through piles of memoranda and reports. Finally, he attends two cabinet meetings a week, receives delegations, makes speeches, goes to official receptions, and gets a little recreation if he can.

Their positive character.

Many people think of government in its negative or restraining aspects only. The government, as they see it, is an organization that keeps foreign enemies away, prevents internal disorder, punishes wrongdoing, forbids this or that, and in general stands in the way of the citizen's doing what he would like to do. But this is only one aspect of the government's work, and by no means the most important one. Government is a constructive as well as a restraining factor in the life of the nation. It does not merely prohibit. It promotes. Most of the functions performed by the various administrative departments of the national government are of a positive character; they involve the doing of things for the benefit of agriculture, industry, commerce, transportation,

[1] The *United States Government Manual* contains the nearest approach to a complete enumeration of the federal administrative authorities and their functions. It is published as a detachable-leaf handbook to facilitate its being kept up-to-date.

banking, labor, public health, education, and other interests which come close to the daily life of every citizen. For this reason one should not think of the national government as something afar off. Its work is vital to the safety, health, prosperity, comfort, and convenience of every household in the land. This will be apparent from even a brief survey of what the ten regular departments are trying to do.

I. The State Department

Its functions:

The state department is the oldest among the federal departments and for that reason the secretary of state ranks as the senior member of the cabinet. But he is not a prime minister in any sense of the term, and has no right to call meetings of the cabinet when the President is ill or absent. Secretary Lansing did this on one occasion and was sharply reprimanded by President Wilson for having exceeded his functions. The state department deals chiefly with foreign and diplomatic affairs. It is the channel of intercourse between the government of the United States and all foreign governments; likewise it is the medium of communication between the national and state governments in this country. It negotiates international agreements and treaties, receives and answers diplomatic communications, gives instructions to American ambassadors abroad, issues passports, conducts correspondence with the governors of the various states, and performs many other functions of a related character. The secretary of state, therefore, is the American minister of interstate and foreign affairs.

1. Diplomatic.

The foreign service.

A word as to the foreign service. The United States sends to all important foreign countries certain diplomatic officials known as ambassadors or ministers. They are appointed by the President with the consent of the Senate; their business is to look after American interests in the countries to which they go; they report regularly to the secretary of state and get their instructions from his office. At the more important foreign capitals the American diplomatic representatives have the rank of ambassador; at the less important capitals the rank of minister. In duties and authority, however, there is no important difference between the two. The United States also sends other officials known as consuls, and this branch of the foreign service is also under the state department, but consuls or consuls-general are not primarily diplomatic offi-

cers. They are chiefly concerned with the furthering of the nation's commercial interests abroad.

The Rogers act (1924).

Until 1924 the American diplomatic and consular services were separate, but in that year the Rogers act consolidated them into a single body known as the foreign service of the United States. All ranks in the consular branch are now filled by competitive examinations at the bottom and by promotion at the top. The lower ranks of the diplomatic section are also filled in this way, but the highest positions (those carrying the rank of minister or ambassador) are occupied for the most part by persons whom the President chooses directly from civil life. When a young man enters the foreign service he may be assigned to either the diplomatic or the consular branch of it, but transfer from one to the other can subsequently be made. The competitive examinations for admission to the foreign service are difficult, even for college graduates.[1] Successful candidates are required to spend a year in the foreign service school at Washington before being given assignments abroad. This school is conducted by the state department.

2. Internal.

The secretary of state has functions also in relation to home affairs. He promulgates the laws which are passed by Congress; he is the custodian of the national archives or historic documents; he countersigns the President's proclamations, and is the keeper of the great seal. He authenticates warrants for the extradition of fugitives from justice in other countries. Finally, as has been indicated, he is the channel of communication between the federal government and the states. To assist him in the performance of all these functions he has an undersecretary (who stands next in seniority), four assistant secretaries, a solicitor, an economic adviser, and various other coadjutors, all of whom are appointed by the President.

Internal organization of the state department.

The state department is divided into various bureaus and divisions, with separate functions allotted to each—for example, the bureau of indexes and archives, the division of passport control, the divisions of Latin-American affairs, Far Eastern affairs, Near Eastern affairs, Western European affairs, Eastern European affairs, and the treaty division. Some notable figures have served the nation as secretaries of state: Thomas Jefferson, James Madison, John Quincy Adams, Henry Clay, Daniel Webster, William H.

[1] Application forms, lists of examination subjects, and other information can be had by addressing the secretary of state. Women are eligible for appointment.

Seward, James G. Blaine, Richard Olney, John Hay, Elihu Root, and Charles Evans Hughes. These men have given the secretaryship a fine tradition. In the early days of the Union the post was utilized on several occasions as a stepping-stone to the presidency, but since the Civil War no one has moved from the one office to the other.[1]

II. The Treasury Department

A word of explanation.

The department of the treasury is next in order of seniority. While its name might give the impression that this department corresponds to the exchequer or the ministry of finance in European countries, the financial leadership of the American treasury has been less extensive. In most other governments the chief financial minister possesses virtually the entire initiative in all matters relating to fiscal legislation. In England the chancellor of the exchequer introduces all money measures and defends them on the floor of parliament, but in the United States the secretary of the treasury has no such legislative leadership. Financial measures are brought before Congress by its own committees. The secretary of the treasury may advise or recommend; but his advice may be (and sometimes is) treated with scant consideration by both Houses of Congress. The secretary and his staff may go to a great deal of pains in preparing data for a new tax law; but the chances are that Congress will be moved by political considerations to disregard a good deal of it. Public finance is a branch of economics, but Congress has usually dealt with it as a phase of party politics.

Hamilton's intention.

This was not the original intention. Alexander Hamilton had much to do with the establishment of the treasury department and it was his expectation to follow the English model. He hoped, as secretary of the treasury, to appear on the floor of Congress and present the government's financial plans just as the English chancellor of the exchequer does in the House of Commons. But Congress declined to accord him this privilege and asked that he submit his estimates in written form. As a result of this action the opportunity to establish a close relation between financial planning and financial legislation was promptly lost.

It is here that the principle of separation of powers has operated

[1] For a discussion of the history and work of this department see Gaillard Hunt, *The Department of State of the United States, Its History and Functions* (New Haven, 1914). Its present organization is fully described in John M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), chap. xii.

at its worst. The services of the one department which knows most about the financial needs of the government have not been adequately utilized by Congress in planning the federal tax system and the national expenditures. Congress has guarded with extreme jealousy its control of the purse, even to the extent of sometimes resenting advice from those executive officials who are obviously the best equipped to tender it. Hence the secretary of the treasury is not responsible for the fiscal policy of the federal government. He does not determine how the revenue shall be raised or how much money shall be spent.[1] Such matters are the waifs of dark-lantern politics. Only when the President controls a dependable majority in both branches of Congress is it possible for the treasury department to hope that its financial plans will be legislated into effect.

Curious position of the department.

The actual work of the treasury department is extensive and important. It may be grouped into four divisions. *First*, there is the collection of revenue, especially the supervision of work performed by customs officers and collectors of internal revenue. This includes the duty of issuing all regulations relating to revenue matters and the deciding of appeals which come to the department from the rulings of subordinate officers. *Second*, there is the custody of the public funds and the paying of all bills for expenditures which have been properly authorized. There is a physical treasury (with strongly guarded vaults) in Washington. For many years there were subtreasuries in nine important cities, but these were abolished in 1921 and the surplus funds of the government are now deposited, for the most part, in the various federal reserve banks.[2] But government money may also be deposited in national and state banks at the discretion of the secretary of the treasury under restrictions established by law. Meanwhile, by the provisions of the social security act (1935) the treasury department has been given a greatly increased responsibility as respects the custody and investment of funds. For this statute imposes upon the secretary of the treasury the function of receiving and safely investing in government bonds all the contributions of employers and employees in connection with the old age pension and employment compensation plans.[3]

Work of the treasury department:

1. Collecting the revenue.

2. Custody of public funds, paying of bills and investing.

[1] See pp. 371–381.
[2] For an explanation of the federal reserve bank system see pp. 397–401.
[3] See also *below*, pp. 443–446.

3. Mints and currency.

Third comes the entire supervision of the currency, including control of the mints which coin the money.[1] These functions are apportioned among the comptroller of the currency, the director of the mint, and the director of the bureau of engraving and printing. With this goes the supervision and inspection of the national banks and various powers in relation to the federal reserve system. The issue of government bonds and the borrowing of money, when authorized by Congress, are likewise in the department's charge.[2]

4. Non-financial duties.

Finally, there are various functions relating to the construction and maintenance of public buildings, the control of the coast guard and lifesaving service, the supervision of the quarantine and public health services, and of the government printing bureau. This bare enumeration of important functions will suffice to show what a large and varied amount of work the treasury department has to do.

Budget authority is not included.

In most other countries the treasury department prepares the budget, but this is not the American practice. As will be more fully explained a little later, this duty in the United States is devolved upon an official known as the director of the budget who has merely a nominal connection with the treasury department and is directly responsible to the President. When the budget is ready, moreover, it goes directly to Congress without passing through the hands of the country's chief financial officer, the secretary of the treasury. Similarly in most other countries the treasury department is responsible for the auditing of public accounts, whereas in the United States a comptroller-general, who is not under treasury control, is given this responsibility.[3]

Internal organization of this department.

Next in rank to the secretary of the treasury is the undersecretary. Then there are three assistant secretaries who are at the head of sections into which the various divisions and bureaus of the department are grouped. Likewise there are various other high officials including the director of the mint, the comptroller of the currency, the commissioner of the public debt, and the various heads of the internal revenue bureau, customs service, coast guard, secret service, and so forth. The headship of the treasury department has been held at various times by men of great financial ability, beginning with Alexander Hamilton and

[1] For a discussion of currency matters see pp. 387–391.
[2] See *below*, pp. 381–385.
[3] See *below*, pp. 367, 374.

including among his successors Albert Gallatin, Salmon P. Chase, and John Sherman.

III. The War Department

Military functions.

The war department in the United States is chiefly concerned, of course, with the maintenance and administration of the army. It has to do not only with the enlistment and equipment of men for all branches of the service, but with contracts for supplies, fortifications, the transportation of troops, and the training of officers. Even in time of peace these functions are of no inconsiderable importance, but in time of war they become tasks of stupendous magnitude, involving millions of men and billions of dollars. Before the United States entered the Great War the internal organization of this department, with its eleven bureaus, was complicated enough; today it is so elaborate that even a bare outline would fill many pages.

The chief of staff.

Of great importance in this military mechanism is the general staff of the army. It is a planning rather than an administrative body and as such is responsible for preparing the general scheme of national defense. Officers of the regular army are assigned to the general staff by orders of the President from time to time, and there is a chief of staff with the rank of general at its head. The secretary of war depends on this officer for advice on all military matters, inasmuch as he himself is not ordinarily a man of military experience. Under the direction of the general staff are the various bureaus and branches of the army.

Civil functions.

In addition to his military functions, moreover, the secretary of war has two important fields of civil authority. One is the construction of certain public works undertaken by the national government, such as the dredging of harbors or the improvement of waterways, this work being undertaken by the engineer corps of the army. Even the Panama Canal was the work of army engineers. All the navigable waters of the United States are under the final jurisdiction of the war department. No obstruction to navigation (in the way of bridges or piers, for example) may be erected anywhere without this department's consent.

The other function is that of supervising the administration of the insular possessions. The Philippines and the Panama Canal Zone are under the administrative supervision of the war department, the former having been left there since the initial occupation

by the armed forces of the United States during the Spanish War. This supervision over the Philippine Islands has been considerably diminished by the establishment of the new Philippine Commonwealth and will be entirely terminated with the achievement of independence in 1946.[1] The war department's work in relation to the Philippines and the Canal Zone is handled by its bureau of insular affairs. Unlike the chief European countries, the United States has no department of colonial affairs. Three departments divide the work of supervising the American dependencies. The war department looks after the two possessions just mentioned, but Alaska, Hawaii, Puerto Rico, and the Virgin Islands are under the general supervision of the interior department, while the navy department remains in charge of Guam, Samoa, and certain minor Pacific islands.

Its head is usually a civilian.

The head of the war department has usually been a civilian, although a few men of military experience, such as Generals Knox, Grant, and Sherman, have held the post. This is quite in contrast with the practice in the countries of continental Europe and in Japan, where high officers of the army are virtually always selected for the post. Both methods have their respective advantages. An army officer is likely to have a better appreciation of the technical phases of the work, but a civilian may be better qualified to handle such matters as contracts, transportation, the construction of public works, and the administration of the insular possessions. The secretary of war does not need to know anything about military science. He can obtain advice on such matters from his chief of staff who is assumed to be the best military expert in the land. Moreover, the subordination of the military to the civil branch of the government is something that should at all times be plainly established in a democracy, even at the risk of a slight lapse in military efficiency.

IV. The Navy Department

Scope of the navy department's functions.

The functions of the navy department are for the most part implied by its designation. The construction, arming, and distribution of the naval vessels, both regular and auxiliary, the establishment and maintenance of navy yards, the enlistment of men, the making of contracts for supplies, and the general administration of the country's armed forces afloat—all these branches of

[1] See *below*, p. 499.

work are included. The secretary of the navy, like the secretary of war, is practically always chosen from civil life and is advised on technical matters by the general board of the navy, a body composed of high naval officers assigned by the President. Corresponding roughly to the army chief of staff the navy department has its chief of naval operations. Under his direction the work of the department is performed by eight bureaus, such as navigation, ordnance, engineering, and a number of special boards. The marine corps comes within the jurisdiction of the navy department.

The air force.

A word should be said about the air force. In most European countries this is a separate branch of the national defense, quite distinct from the army and the navy. Great Britain, for example, has a minister of air with a place in the cabinet. In the United States the air force does not form an independent unified organization but is divided between the army and the navy, each of which has its own aëronautical service. Proposals to consolidate the military, naval, and postal air services into a unified department of aëronautics have been made but have not yet found favor in the United States. An even wider proposal to combine these air forces along with the army, navy, and marine corps into one great department of national defense has also been discussed but without action. On the other hand there is a coördinating board representing the army and navy which is intended to ensure an adequate degree of unison between the military and naval air forces.

V. The Department of Justice

The attorney-general.

Next comes the department of justice. The attorney-general is its head and serves as the chief legal adviser of the national government. The President and the heads of departments call upon him regularly for his opinions with respect to points of law. These *Opinions of the Attorney-General* are published, after the manner of judicial opinions, and often establish important precedents. They are rendered to the executive branch of the government only, and never to Congress or to legislative committees. The attorney-general is also the representative of the nation in all legal proceedings to which the United States is a party. He and his assistants conduct suits against corporations and individuals who violate the federal laws, but his advisory and administrative

duties are now so great that he no longer personally appears in court, even in the Supreme Court, except on rare occasions. Cases before the Supreme Court are usually argued, on behalf of the United States, by the solicitor-general, who is the ranking officer of the department.

Again, the attorney-general and his assistants are given the responsibility of reviewing, as to form and legality, all executive orders before they are issued by the President. Likewise they deal with the settlement of claims against the United States. The bureau of criminal identification, which collects and classifies records relating to known criminals for the use of police authorities throughout the United States, is in the department of justice, which in addition has supervision over all federal penal institutions as well as matters arising under the federal probation laws.

The department of justice also supervises the work of the federal district attorneys and marshals throughout the country. There are about eighty of these districts. Likewise the attorney-general, either personally or through a special member of his staff, investigates and reports to the President upon all applications for reprieves or pardons. The burden of work has become so heavy that there are now six or seven assistant attorney-generals, each of whom is assigned to some important field of departmental activity.

VI. The Post Office Department

Scope of its work.

The postmaster-general is what his title implies. His department has the largest number of employees (over 300,000 in all) and hence the greatest range of political patronage, although this has now been greatly diminished by placing most of the positions in the classified service. The United States postal service is the biggest business of its kind in the world, with 50,000 post offices and a gross turnover of about a billion dollars per annum. In conducting this great enterprise the postmaster-general awards contracts for the transportation of the mails both on land and sea. He also assumes oversight of the air-mail service, the rural mail service, the parcels post system, the handling of money orders, and the postal savings banks.[1]

An important authority possessed by the postmaster-general

[1] See also *below*, pp. 466–467.

is that of denying the use of the mails to swindlers, promoters of lotteries, and all concerns which may come under the ban for using the service wrongfully. By prosecution for the fraudulent use of the mails, moreover, it often happens that dishonest promoters who have been shrewd enough to keep from the clutches of the state authorities are brought to account in the federal courts. A federal policeman.

The United States postal service is a big business—but does it pay? That question has been the subject of much controversy. The answer to it depends on how you interpret the figures. Usually the post office department reports a fair-sized deficit. But part of this is due to the enormous amount of matter (official correspondence, congressmen's mail, etc.) which amounts to nearly half a billion pieces of mail a year and is carried free. If it did not go free, some other department would have to pay for it. The carrying of first-class mail yields a handsome profit, but virtually all other classes of mail (e. g., newspapers, magazines, and parcels) are carried at a loss. It is assumed to be good social policy to carry these forms of mail cheaply so that the reading habits of the people may be encouraged and retail trade promoted. If the postal service were conducted on strictly business principles it would doubtless yield a large profit but there are considerations other than those of profit and loss involved. The results of political patronage, moreover, are even more costly in this department than in any other. Postal profits and deficits.

VII. The Department of the Interior

The department of the interior has a title which does not afford a very good clue to its functions. In the countries of continental Europe there are departments called by this name and they have mainly to do with interior problems such as the supervision of local government, including the government of counties, cities, and towns. But the department of the interior at Washington has nothing to do with local government. It has a great variety of duties and they are of such a miscellaneous character that it has sometimes been called the "department of things in general." These functions can be enumerated (if one has the time and patience to do it), but they cannot be grouped or classified. Things which belong nowhere else have been turned over to this department, one after another, until it has become a rare hodge-podge of unrelated jurisdictions. For example, it has charge of Indian affairs, public lands, the conservation of natural resources, Its name and its functions.

national parks and monuments, the geological survey, the promotion of safety in mines, the reclamation of waste lands including irrigation projects, the administration of the federal laws relating to the conservation of oil, relations with Alaska, Hawaii, Puerto Rico, and the Virgin Islands, and, strange to say, the educational work of the national government, for the federal office of education is sheltered in this carryall of a department. To be interested in all phases of his work the secretary of the interior must indeed be a man of uncommon versatility.

A difficult department to manage.

Not only that but he must be an adroit and cautious man, for no other department is so beset with people who have their own ends to serve. Oil leases and timber leases on government lands, for example, have proved slippery things to handle. They have brought more than one secretary of the interior into humiliation. Indian affairs are likewise a constant source of embarrassment, for the poor Indian has ever so many pale-face friends and exploiters who besiege the department with protests and plans. Numerous sections of the country want swamp lands reclaimed, desert lands irrigated, or other waste territory made usable at government expense. Then Hawaii, that picturesque little melting-pot in the mid-Pacific, sets its varied problems at the department's door. Puerto Rico and Alaska, which represent America's dominion over palm and pine, do the same. And the various educational associations in the United States give no surcease from clamor for something or other out of the national treasury. If a statesman considered his own peace of mind the department of the interior is the last one that he would choose, especially in times of economic depression when vast projects of unemployment relief are carried on in connection with the work of land reclamation.

VIII. The Department of Agriculture

Varied functions with a common tie-up.

The secretary of agriculture has also acquired a varied list of responsibilities, but all of them have to do, in one way or another, with the winning of man's livelihood from the soil. They include the maintenance of agricultural experiment stations, and of various other institutions for the study of soils, plants, and livestock, the distribution of seed, the establishment of cattle quarantines, the inspection of meats and other food products, the inspection of markets, the administration of federal road funds, the making of scientific studies relating to highway construction, irrigation,

and drainage, the issue of agricultural bulletins, the compilation of weather reports, the management of the forest service, the compilation of crop reports and crop forecasts, the conservation of wild life, the management of the crusade against noxious insects, the enforcement of the laws relating to grain exchanges, and many other things of an allied nature. If one desires an impressive illustration of the government's "constructive" work, there is none better than this. The department of agriculture, through the work of its more than a dozen bureaus, offices, and services, has enormously increased the productivity of the land.[1] Its work is supplemented by the work of the states, most of which maintain their own departments of agriculture.

IX. The Department of Commerce

Its activities.

In 1903 Congress created a department of commerce and labor but ten years later this was divided into two departments. The department of commerce now has about a dozen bureaus and services. One of the most important is the bureau of foreign and domestic commerce which has to do with the development of trade both at home and abroad. Other bureaus are concerned with the licensing and inspection of steamboats, the maintenance of lighthouses and other aids to navigation, the regulation of fisheries, and the making of coast and geodetic surveys. The bureau of the census and the national bureau of standards are likewise in this department, and the patent office was transferred to it in 1925. One of its bureaus, moreover, has various duties in connection with the maintenance and development of the merchant marine. Finally, the promotion and regulation of commercial air transportation, including the maintenance of aids to air navigation, the licensing of planes and pilots, the making of air traffic regulations and the investigation of airplane accidents, constitute a responsibility of the bureau of air commerce which is included in this department.

X. The Department of Labor

The department of labor has direction of the immigration service and the administration of the naturalization laws. It includes a

[1] The administration of the crop control program is under the general supervision of the secretary of agriculture; its organization and functions are described *below*, pp. 253–254, 446–448.

conciliation service which seeks to settle labor disputes.[1] Likewise it collects labor statistics and publishes, at regular intervals, various bulletins on labor conditions in the United States and other countries. The department includes a women's bureau and a children's bureau to which are entrusted the administration of the laws relating to the employment of women and minors in areas under federal control. There is likewise an employment service which is charged with the function of developing and coordinating a national system of employment offices. In a word, this department seeks to do for the interests of labor what other departments have done for agriculture and commerce respectively.

Social security board.

In 1935 Congress passed a social security act providing for old age pensions, unemployment insurance, grants-in-aid for dependent children and federal assistance in public health work.[2] The detailed administration of the old age pensions and the system of unemployment insurance is devolved upon the states, with the federal government making contributions and providing the supervision. The federal agency in general charge of the work is a board of three persons appointed by the President with the approval of the Senate for terms of six years, with one member retiring biennially. This board is included within the department of labor. Its function is to administer the provisions of the law with respect to old age and unemployment benefits with the exception of matters relating to the collection of taxes and the making of investments.

National labor relations board.

Mention should also be made of the national labor relations board which is associated with the department of labor but is not one of the regular bureaus within that department. Its duty is to investigate issues, facts, practices, and activities in the field of labor relations to the extent that these directly affect the free flow of interstate commerce.[3] When it finds unfair labor practices it may issue a "cease and desist" order which is enforceable by the courts. Likewise the board is empowered to conduct elections by secret ballot of the employees to determine by what person, persons, or organization the employees desire to be represented in the process of collective bargaining. The board reports to the President through the secretary of labor but the latter has no power to review or alter its findings.

[1] See also *below*, p. 425.
[2] For a discussion of the social security system see *below*, pp. 443–446.
[3] See also *below*, pp. 448–449.

Summary.

Those are the ten regular departments. They are not arranged on any logical, orderly, or systematic basis. They have grown up, one by one, to meet new conditions. When a new bureau or division is needed, it is put wherever seems most convenient at the time. Then, when a department becomes overcrowded, some of its bureaus or divisions are shifted elsewhere. Under the circumstances it is not surprising that one can detect a good deal of confusion and overlapping in the existing organization. Everyone in Washington is aware of this. From time to time it has been proposed to give the organization a general overhauling, but there are all sorts of political, personal, and practical obstacles in the way, and nothing has yet come of the project.[1] Likewise there are persistent clamors for the establishment of additional departments—a department of public works, of public health, of education, of public welfare, of highways, of conservation. But the tendency has been to create new and independent administrative boards, services, offices, and authorities outside the purview of the ten regular departments, thus providing the additional machinery that may be desired.[2]

Should members of the cabinet sit in Congress?

It has often been urged that a greater degree of harmony and coöperation between the executive and legislative branches of the national government would be secured if members of the cabinet were allowed to sit and speak (although not to vote) in both Houses of Congress. Resolutions to that effect have been introduced on several occasions but have never found much favor, although Congress has an undoubted right to give anyone this privilege under a provision of the constitution which authorizes both Houses to make their own rules of procedure. For a hundred years, moreover, delegates from the territories have been allowed to sit in the House of Representatives and to speak there, although having no right to vote. The constitution excludes any person "holding office under the United States" from being "a member of either House during his continuance in office," but the head of a department, by taking a part in the deliberations of either House, would not become a member of it any more than the chaplain or the clerk. He would have no official term, no privilege of immunity from arrest, no vote, none of the constitutional attributes of a member.

[1] See W. F. Willoughby, *The Reorganization of the Administrative Branch of the National Government* (Baltimore, 1923).

[2] These multifarious independent agencies and "administrations" are described in the next chapter.

Merits of the idea.

Conceding, however, that Congress has the power to admit the members of the cabinet to its sessions, would it be expedient to do so? That question has been many times discussed, and there are undoubtedly two sides to it. On the one hand, it has been urged that Congress could, in this way, obtain more useful and more exact information than it now obtains through roundabout channels; that the change would inspire the President to choose, as members of the cabinet, men of greater public experience, and that it would also compel these men to become proficient in the affairs of their several departments, for no incapable head of a department could keep from demonstrating his incapacity if he had to take part in the deliberations of Congress day by day. The plan would help to supply both Houses with leadership and would bring team-play into the operations of government.

Objections to it.

On the other hand, it is obvious that by placing ten cabinet secretaries on the floor of Congress the executive branch of the government would acquire a greatly increased influence over the making of laws, even though these cabinet members would have no vote in either House. Members of the cabinet would probably be chosen, under such conditions, because of their debating power in the Senate and the House, rather than for their executive capacity. A premium would be placed on the selection of men who had served in Congress and had acquired a strong following there. The President would then have, in both Houses, ten loyal defenders who would be privileged and ready to use their convincing oratory in his behalf. It would greatly enhance his power in promoting or opposing legislation. Men who had not been elected by the people would have a large influence—by their share in the debates although not by their votes—in the making of laws, voting of money, and framing of national policy. One cannot be sure that such an arrangement would prove wise. And why confine the privilege to members of the cabinet? Some heads of the independent governmental agencies would have an equally strong claim to share it.

Those who serve as the President's chief administrative subordinates, whether in the cabinet or out of it, have already quite enough to do without daily participation in congressional debates. If they had to spend time in the legislative chambers they could not hope to gain adequate familiarity with the problems which come to their own office-desks. It hardly avails to say that mem-

bers of the British cabinet find time to participate in parliamentary debates, for this British practice has not proved an undiluted success, as students of comparative government know. If Congress suffers from too little executive leadership, parliament suffers from too much.[1]

English and American cabinets contrasted:

A favorite theme of writers in the field of comparative government has been the series of contrasts between the cabinet system of England and that of the United States. The differences, of course, are wide and fundamental. It is hardly worth while to discuss them at length, for they are relatively easy to comprehend. Here are the chief dissimilarities set down under three main heads:

1. Qualifications of members.

The members of the English cabinet must be members of one or the other branch of parliament; in the United States the members of the cabinet must not be members of either House of Congress.

2. Powers of initiative in legislation.

In England the cabinet is the "great standing committee of parliament," arranging all important business in advance, championing these measures on their way through both chambers, and assuming the function of legislative leadership. Englishmen are fond of writing about the cabinet's "strict responsibility to the House of Commons," but the actual practice of English government gives quite as much warrant for a statement that the House of Commons merely follows the cabinet's leadership.

In the United States the cabinet may, in an informal way, help the President with proposed projects of legislation, but it can assume no formal responsibility and it can take no open share in facilitating the progress of legislation. The most important practical power of the English cabinet, that of guiding business through the legislative chambers, does not belong to the cabinet in America.

3. Responsibility.

Finally, the English cabinet is by usage responsible to the House of Commons, while the cabinet of the United States is not responsible to Congress. An adverse vote on any important question in the House of Commons is sufficient to overthrow the cabinet in England; a hundred adverse votes in the Senate or the House of Representatives would not necessarily cause the members of the American cabinet to resign. Their responsibility is to the President alone. This is, after all, the outstanding difference between

[1] See the chapter on "The Ministry" in the author's *Governments of Europe* (revised edition, New York, 1931).

the two cabinets. In England the executive branch of the government is ultimately dependent upon the will of the House of Commons; in America it is independent of Congress, supreme within its own sphere and accountable to the people alone.

Which plan is the better? That is a question which it would be a waste of words to argue about. It would be like engaging in a debate on the relative strength of an elephant and a whale. Each is fitted to its own element and would make a poor showing were it to change habitats. Both the English and American systems have served their purpose, each in its own political orbit, and the adaptation of the agent to its environment is as essential in the body-politic as in living organisms. If the American system shows its weakness in the defective coöperation which it provides between the two great arms of government, it has an offsetting merit in the considerable amount of protection which it affords against the undue gravitation of power into a few hands.

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The Departments. On the departments there are such books as Gaillard Hunt, *The Department of State of the United States* (New Haven, 1914), A. Langeluttig, *The Department of Justice of the United States* (Baltimore, 1927), Lindsay Rogers, *The Postal Power of Congress* (Balti-

more, 1916), D. C. Roper, *The United States Post Office* (New York, 1917), and W. L. Wanlass, *The United States Department of Agriculture* (Baltimore, 1920).

Special mention should be made of the long series of *Service Monographs* (about seventy of them) published by the Institute for Government Research. These monographs take up, one by one, the various bureaus, divisions, and offices of the national administration.

On recent administrative developments reference may be made to Charles A. Beard and George H. E. Smith, *The Future Comes: A Study of the New Deal* (New York, 1933).

For further references on various phases of the subject see Sarah Greer, *A Bibliography of Public Administration* (2nd edition, Part I, New York, 1933).

CHAPTER XIV

THE INDEPENDENT AND EMERGENCY ADMINISTRATIVE SERVICES

Nothing is so galling to a people as a paternal, or, in other words a meddling government, a government which tells them what to read, and say, and eat, and drink, and wear.—*Macaulay.*

Bureaus and boards outside the regular departments.

Until about fifty years ago the entire administrative work of the national government was performed by the regular departments. Even at that, some of the departments were not overbusy. But during the past half-century the general concept of governmental functions has undergone a steady change. The idea that a government should "govern best by governing least" has given way to the doctrine that it should actively intervene to control and regulate the free play of economic and social forces. In other words it has become a more or less generally-accepted political philosophy that governments should regulate transportation, communication, industrial organization, labor relations, banking, credit, insurance, the issue of securities, the overproduction of crops, the price of silver and a great many other things. Out of this altered concept has developed a steady expansion of governmental activities. This, in turn, has created new administrative duties which to some extent have been absorbed by the ten regular departments, but for the most part have led to the establishment of independent agencies outside the cabinet circle.

Reasons for their existence.

A variety of reasons, historical, political, and personal, have dictated the creation of these numerous boards, bureaus, and offices with an independent status. In some instances there was a desire to provide bipartisan representation (as in the case of the civil service commission) and this could not be done if the work were placed in any single-headed department. In other instances there seemed to be an urgent need for continuity, which could be had by so constituting a board that only one of its members would retire at a time. And in still other cases the creation of an independent agency was dictated by the fact that no one of the regular departments was anxious to undertake the new duties. Finally,

some of the new services were called into existence by the emergency program and it seemed desirable to place them in a position of direct responsibility to the President. At any rate the whole system has grown by merely adding one piece of administrative machinery to another until the result is a jumble which almost baffles description.

The changing administrative scene.

A complete list of these independent and emergency administrative services, with a detailed statement of their functions, would fill an entire volume. Even then it would be inaccurate within a few months because of the almost daily changes which are being made in the organization of the different agencies and in the distribution of duties among them. For most of these changes do not require action by Congress: they can be made by executive order. In 1933 Congress gave the President a wide range of power to combine, coördinate, or abolish administrative agencies and this authority has been freely used, especially with respect to those offices which have been set up during the past few years as part of the recovery program.

Two classes of independent agencies: permanent and emergency.

Today there are at least a hundred commissions, boards, bureaus, divisions, offices, services, "administrations" and "authorities" created by the national government to function outside the ten regular departments.[1] As a preliminary classification they may be grouped into two categories: those which have been established as part of the nation's permanent administrative equipment, and those which have been created to cope with the economic depression. The latter are not avowedly intended to be permanent, and some of them have been established under laws which expire at a given date. But it is an axiom of practical politics that governmental agencies invariably try to perpetuate their own lives and are never ready to give up their powers when the conditions which called them into existence have passed. They seek, and usually find, reasons to justify their immortality. Some of the so-termed emergency services, therefore, are likely to become permanent additions to the administrative mechanism.

Among the permanent administrative agencies outside the regular departments, some of the most important are the regulatory

[1] A complete list of all the administrative agencies of the federal government, including the regular departments, the independent boards, and the emergency (or alphabetical) services, may be found in the *United States Government Manual* issued by the National Emergency Council. This publication includes a brief statement of the work performed by each agency. See *above*, p. 221, *footnote*.

The permanent regulatory agencies.

boards which have been established at various times for the purpose of making sure that laws passed by Congress for the control of transportation, communication, and industry are properly carried into effect. They exist because such laws rarely achieve their purpose unless some body of officials is given the direct responsibility for administering them. They exist, for a second reason, because successful regulation requires a resiliency which statutes are unable to provide. To secure flexibility in the administration of a regulatory statute it is necessary to endow some administrative agency with power to use discretion within the general provisions of the law.

The Interstate Commerce Commission

Oldest of the regulatory boards:

The interstate commerce commission is the oldest among these permanent regulatory boards. It was established in 1887 to supervise the execution of the national laws relating to foreign and interstate trade, more particularly the laws relating to the railroads. The original powers of the commission, however, have been greatly extended by successive acts of Congress during the past quarter of a century. Today it is charged with the duty of seeing that the

1. Its functions.

interstate railroads and other common carriers maintain reasonable rates and give adequate service. To this end its approval must be had for rates and fares charged by companies engaged in interstate transportation. Its permission is also needed before an interstate railroad can issue new securities, or build new lines, or abandon old ones. The commission prescribes the form in which accounts and records shall be kept by all carriers within its jurisdiction and may require periodical reports from them. It also administers the several acts of Congress with reference to safety appliances on railroads. Finally, the interstate commerce commission has been vested by Congress with the duty of preparing and adopting a plan for the consolidation of the railroads into a limited number of general trunk systems; meanwhile its approval is necessary before any merger of railways can take place. By an act of Congress in 1935 the commission was given jurisdiction over motor carriers engaged in interstate transportation.

2. Its organization.

The commission is now composed of eleven members, each appointed for a seven-year term by the President with the consent of the Senate. From its membership the commission elects a chairman who serves for one year. It also appoints a secretary

who serves as the board's executive officer, and in addition employs a large staff of engineers, accountants, examiners, attorneys, special agents and other subordinate officials. Because of the large amount of work which it has to do, the commission has created six divisions, each having at least three members, and each of these divisions may make rulings (subject to review by the commission) which have the same force and effect as if made by the commission itself. The work of the interstate commerce commission is quasi-judicial in its nature, for it largely concerns the adjudication of controversies between transportation companies and shippers of merchandise. The commission has become the right hand of Congress in the exercise of its power to control interstate commerce.[1]

Federal Trade Commission

Origin, organization, and principal functions.

Another important board which exercises authority in the domain of commerce and industry is the federal trade commission, established in 1914. This commission took over the work formerly handled by the bureau of corporations in the department of commerce, but acquired from Congress a wide range of authority in addition. It now consists of five members appointed by the President, with the approval of the Senate, for a seven-year term. The act of 1914 forbade unfair methods of competition in interstate commerce and the federal trade commission is empowered in a broad way to investigate and to prevent such practices by all persons, partnerships and corporations except common carriers, telegraph, telephone and radio companies, and banks, all of which are under the supervision of other federal authorities.[2] Unfair practices in industry include such things as unprofitable competition, price discriminations in favor of certain purchasers, and "tying contracts" or agreements to purchase exclusively from one concern in return for price concessions.

Its cease-and-desist orders.

By subsequent action of Congress the commission was given the duty of enforcing the laws against combinations in restraint of trade, otherwise known as the anti-trust acts. The commission likewise is authorized to collect and publish information on the economic phases of domestic industry and foreign trade. To this end it may require the filing of reports by corporations engaged

[1] See also the discussion of the commerce power of Congress, pp. 409–414.

[2] Common carriers by the interstate commerce commission; telegraph, telephone, and radio companies by the federal communications commission, and banks by the comptroller of the currency.

in interstate commerce and may investigate complaints made by foreign firms against American importers or exporters. When the commission finds on investigation that any unfair trade practice is being pursued it issues an order to cease-and-desist.[1] These orders, if need be, are enforced by the federal circuit courts of appeals, which also have power to set aside or modify the orders if they find that the commission has overstepped its legal authority.[2]

Federal Communications Commission

Organization and powers.

The federal communications commission was created in 1934. Its duty is to regulate interstate and foreign communication by wire or radio. Prior to 1934 this function was divided between the interstate commerce commission (which had authority over telegraph, telephone, and cable companies) and a federal radio commission. The new commission combines both these jurisdictions with a view to making the system of regulation more effective. It has a membership of seven, appointed by the President with senatorial concurrence, one of its members being designated as chairman. The federal communications commission has apportioned its work among three divisions, namely, the telegraph, telephone, and broadcasting divisions. It maintains twenty field offices at various points throughout the United States.

The regulation of radio broadcasting.

A large part of the commission's responsibility, at the present time, is connected with the licensing of broadcasting stations, the allocation of wave-lengths to them, the determination of the hours in which they may operate, and the placing of limitations upon the amount of sending power that they may use. The communications commission may revoke a license in any case where it finds that a station is not being operated in the public interest. This gives it a measure of authority over broadcasting which might readily be widened into a general censorship. Thus far, however, the commission has refused to exercise any close surveillance over radio programs although it has occasionally ordered the revocation of licenses for such offenses as the use of scurrilous language and the broadcasting of fraudulent advertising. All radio stations, of whatever capacity, are subject to federal licensing on the theory that they are engaged "in interstate commerce," although it is

[1] See also *below*, pp. 438–439.

[2] For an explanation of these courts see pp. 539–540.

not commerce but entertainment which most of their programs feature. Even the so-called local stations are held to be interstate in their scope, for potentially their waves go across state boundaries.

Securities and Exchange Commission

New security issues.

A newcomer in the field of federal regulation is the securities and exchange commission, established in 1934, and consisting of five members. They are presidential appointees, with the Senate's approval, and serve for five years, one member retiring annually. The commission was set up to administer the provisions of statutes which Congress enacted during 1933–1934 in its endeavor to curb various abuses which had become widely prevalent in the flotation and marketing of securities.[1] To this end the laws require that all new issues of securities, except a few exempted ones, must be submitted to the commission before being offered for sale in interstate commerce or through the mails. In connection with this submission a registration statement must be filed giving all essential information, for the truthfulness of which the promoters are responsible. The commission does not pass on the intrinsic value of any securities which it approves for issue, but merely requires the full disclosure of such facts as will enable an intelligent investor to use his own judgment.

Regulation of stock exchanges.

The commission also regulates the stock exchanges. Its approval of their organization and by-laws is required. Likewise all securities listed on such exchanges must be registered with the commission and in this connection the commission may require a full disclosure of financial conditions in those corporations whose securities are listed. Its duty is also to prevent the making of unfair profits in stock-market manipulations by "insiders" who acquire knowledge superior to that of the investing public. The practice of buying stocks on margin is likewise subject to regulation, but rules relating to the amount of such margins are made by the federal reserve board.[2] The general purpose of all this regulation is to provide investors with adequate information about securities so that they may be enabled to form intelligent opinions concerning the true value of stocks and bonds, likewise to protect the public against fraud by insisting that stock exchanges shall be unmanipulated and honestly conducted.

[1] The securities act of 1933 and the securities exchange act of 1934.

[2] See *below*, p. 398.

Jurisdiction over public utility holding companies.

By the public utility holding companies act of 1935 the securities and exchange commission was also given powers in relation to all public utility holding companies which are engaged in interstate commerce or which make use of the mails in connection with their business. As will be more fully explained later, the commission has power to require the registration of all such concerns and is vested with the function of bringing about a simplification of public utility corporate organization in order that the interests of both consumers and investors may be properly safeguarded.[1]

Social Security Board

Old age pensions and unemployment compensation.

Another federal board, of high potential importance, is the social security board which was established (1935) in accordance with the provisions of the social security act. The social security board consists of three members appointed by the President. Its general function is to supervise the administration of those portions of the social security law which relate to old age pensions and unemployment compensation.[2] It does not have jurisdiction over other matters which are covered by this important statute, including aid for the blind, public health work, and child welfare. Nor does it have the responsibility for investing the funds which are accumulated from the contributions of employers and employees under the provisions of the law. This duty is devolved upon the secretary of the treasury.

Federal Power Commission

Its organization and functions.

Another regulatory board of a permanent character is the federal power commission. As reorganized in 1930 this body consists of five commissioners appointed by the President, and its chief function is to administer the provisions of the federal water power act which Congress passed in 1920. This statute represents the desire to promote the improvement of navigation and the development of water powers through the licensing of projects in streams subject to federal jurisdiction, while at the same time protecting power-users against unreasonable rates. It may be mentioned that all navigable streams, wherever situated in the United States, are to a considerable extent under federal jurisdiction. In order to protect the consuming public and tc promote the financial stability

[1] See *below*, pp. 428–430.
[2] See *below*, pp. 443–446.

of water-power enterprises which have been licensed by the national government, the commission is authorized to regulate their rates and conditions of service whenever they are engaged in interstate business or in business wholly within a state if the state has no regulatory agency of its own.

Rentals and recaptures.

The payments to be made, by way of rental, for water-power licenses are fixed by the commission. It is also provided by the federal laws that the United States, or any state or municipality designated by it, shall have the right to take over any licensed water-power enterprise at the expiry of the license term upon payment of the net investment which must not exceed the fair value at the time of the taking over. To make this "recapture" provision effective the commission requires all licensees to keep an approved system of accounts and each year it figures the net investment currently. As a very large additional task the commission was directed in 1934 to make a nation-wide survey of power resources, rates charged for electricity, and costs of electrical distribution.

The Tariff Commission

History, organization, purposes, and powers.

Then there are various boards and bureaus whose functions are not regulatory in the usual sense but serve to facilitate the administration of various important federal laws. The tariff commission is one of these. Twenty years ago or thereabouts Congress authorized the establishment of this board, which was subsequently given additional powers and considerably reorganized in 1930. It is now made up of a chairman, a vice chairman and four other members, all of whom are appointed by the President in the usual way for a six-year term, with one term expiring each year. Not more than half the membership may be drawn from one political party. The commission's primary function is to investigate and report on tariff matters in general and to make such special studies as the President or the appropriate committees of Congress may require. For example, the staff of the commission compiles classifications of imported articles which are comparable with those of American production, and ascertains the import costs of such commodities.

Its function in relation to the "flexible clause."

Likewise the tariff commission investigates the difference between the production costs of commodities in the United States and abroad, using these investigations as the basis of recommendations to the President in connection with the "flexible clause" of

the American tariff.[1] It has also been given the duty of searching out instances in which any foreign country discriminates against imports from the United States and of inquiring into allegations of unfair practices in connection with the importation of goods. The commission, finally, serves as a source of information and advice in connection with the negotiation of foreign trade agreements insofar as these involve tariff modifications. It is scarcely necessary to point out, of course, that the tariff commission does not frame the tariff. That function belongs to Congress which is supposed to utilize the commission's knowledge of the subject, but usually does so to a very limited extent. Tariff schedules are drawn by congressional committees with more reference to political pressure than to expert advice concerning economic requirements.

Civil Service Commission

Administering the merit system.

The civil service commission is one of the oldest among the independent boards, having been established more than fifty years ago. Its functions, as already pointed out, are to administer the national laws relating to appointments in the classified service.[2] More specifically it makes the rules relating to civil service competitions, and supervises the holding of the examinations. The commission keeps a file of service records covering all persons in the classified service and passes upon the qualifications of all such persons who are proposed for transfer from one classified position to another. The scope of the commission's work may be judged from the fact that in 1934 there were more than 460,000 persons in the classified service out of a total of about 660,000 officers and employees on the federal government's payroll.

Bureau of the Budget

Preparing the budget.

Congress in 1921 provided for the establishment of a national budget system. It directed the President to submit an annual budget and created a bureau of the budget to assist him in performing this duty. The bureau is in the treasury department but is under the immediate direction of the President and hence may properly be ranked as an independent administrative agency. It is headed by a director whom the President appoints. This director's function is to receive from the heads of all administrative

[1] See *below*, pp. 415–417.
[2] See *above*, pp. 189–190.

departments and other agencies their estimates of appropriations needed for the coming fiscal year. These, in consultation with the President, are then revised, reduced, or increased as may seem advisable and combined into a budget. Together with estimates of government revenues this compilation is then transmitted to Congress by the President.[1]

Agencies for the Control of Banking

Federal reserve board.

Several important federal agencies are concerned with banking and credit. First among these is the board of governors of the federal reserve system which includes seven members appointed by the President with the approval of the Senate. In selecting these seven members the President is required to afford fair representation to the financial, agricultural, industrial, and commercial interests as well as to the various geographical divisions of the country. The functions of this board, and its relation to the banking system of the United States, are explained in a later chapter.[2]

Farm credit administration.

The farm credit administration is designed to provide a complete and coördinated credit system for agriculture by making available to farmers both long-term and short-term credits. It includes under its supervision the twelve federal land banks and the various joint stock land banks which make long-term mortgage loans to agriculturists, the twelve intermediate credit banks which make short-term loans on the security of agricultural products and livestock, likewise the twelve production-credit corporations, the central and district banks for agricultural coöperatives (which provide credit for farmer-coöperative purchasing and marketing operations), and the federal farm mortgage corporation which aids in financing the lending operations of the federal land banks.

The farm credit administration consists of a governor, two deputy governors, and four commissioners. It should be explained at this point that the country is divided into twelve districts, in each of which there is a federal land bank, an intermediate credit bank, a production-credit corporation and a bank for coöperatives. All four are located in the same city and have the same directors, but each has its own operating officers. The work of these various institutions will be further discussed in connection with a later con-

[1] For a discussion of budgetary procedure in Congress see *below*, pp. 374–378.
[2] *Below*, Chapter XXII.

sideration of the government's relation to the banking and credit system.[1]

The federal deposit insurance corporation.

The federal deposit insurance corporation was created on the heels of the banking emergency but will undoubtedly be retained as a permanent federal instrumentality. Its board of directors consists of three members, including the comptroller of the currency. The chief function of the FDIC is to insure the deposits of all banks which are entitled to the privilege of deposit insurance under the federal laws. Incidental to this function the corporation may act as receiver for closed banks or may operate new national banks for a limited time in order to make available to depositors in closed banks the insured amount of their deposits.[2]

Miscellaneous Independent Agencies

In addition to the foregoing there is a long list of permanent administrative agencies with functions which do not easily lend themselves to classification. The duties of each, however, is fairly well indicated by its title. For example, there is the Library of Congress which is now the largest depositary of books in the United States, and probably the largest in the world. With its collection of nearly eight million books, pamphlets, periodicals, maps, manuscripts, engravings, and other items this library is administered as a separate agency under a librarian who is appointed by the President. Originally established for the convenience of Congress, the institution has become a national library which attracts research scholars from all parts of the country. Incidentally it has charge of the granting of copyrights.

The Library of Congress.

The government printing office.

The national government does all its own printing, maintaining for that purpose the world's largest printing plant. All bills introduced into Congress, all reports and journals, as well as the daily issues of the *Congressional Record* are printed in this establishment. This publication contains the complete record of proceedings in both Houses. The post office department, however, is the largest customer of the government printing office for post cards, money order applications, change-of-address cards and so forth, although postage stamps are made by another government agency, the bureau of engraving. Other departments, together with the various independent agencies and emergency services, also make heavy

[1] See *below*, pp. 403–406.
[2] See also *below*, pp. 401–402.

demands on the government printing office which provides them not only with printed material but with blank paper, inks and various other supplies. The office is headed by the public printer whose appointment comes directly from the President with the approval of the Senate. All his subordinates are selected under civil service regulations.

The superintendent of documents.

The office of the superintendent of documents supervises the distribution of all federal government publications. Such publications, for the most part, are sold, not given away. The superintendent is appointed by the public printer and is under his general direction, but the office is independent in the sense that it receives its own direct appropriation from Congress. Any government publication can be had from the superintendent of documents at the listed price. Free copies are supplied to a selected list of libraries distributed throughout the country.

The Smithsonian Institution.

More than a hundred years ago an Englishman named James Smithson bequeathed a half-million dollars to the United States of America to found "an establishment for the increase and diffusion of knowledge among men." Why he did this nobody knows, for Smithson had never been in America. He was born in France, educated in England, and died in Italy. At any rate Congress accepted the bequest, created the Smithsonian Institution, and in 1904 did honor to the benefactor by bringing his bones from Genoa to rest in American soil. The institution is governed by a board of regents consisting of the Vice President of the United States, the Chief Justice, three senators, three members of the House and six citizens appointed by joint resolution of Congress. This board appoints the secretary of the institution who is its executive officer. The Smithsonian Institution has under its operating direction various scientific, literary, and artistic agencies including the bureau of American ethnology, the national zoölogical park, the United States national museum and the national gallery of art.

Veterans' administration.

Then there is the veterans' administration into which has been consolidated all federal agencies dealing with veterans' affairs. In 1930 it took over the old bureau of pensions which for many years was included in the department of the interior. In brief, the veterans' administration administers all laws relating to pensions, relief, insurance, hospitalization, and other benefits provided for former members of the military and naval forces or for their widows or dependents. The head of the veterans' administration is an ad-

ministrator, appointed by the President. Some idea of the extensive work which this administration performs may be gleaned from the fact that it has nearly 35,000 employees.

Other agencies.

A score or more of other agencies, varying in importance, have names which generally indicate their functions. Among them are the national mediation board which endeavors to adjust disputes arising between interstate carriers and their employees, the railroad retirement board, the inland waterways commission, the general accounting office (see p. 374), the battle monuments commission, the national archives council, the national historical publications commission, various international boundary commissions, the board of surveys and maps, the central statistical board, the national research council, the science advisory board, and many others.

The Emergency Services

Governmental activity in an economic depression.

The economic depression which began in 1929 was not the first of its kind. It differed from previous depressions, however, in its wider scope and greater severity. Likewise there was a difference in the procedure by which the country tried to deal with it. In all previous economic emergencies (such as those of 1837, 1873, and 1893) the federal government left the problem of relieving unemployment to the states and municipalities. In the early stages of the recent depression it tried to do the same thing; but the critical nature of the situation dictated a change in policy and eventually the federal authorities found themselves loaded with most of the burden. It became their task to provide a program of relief and recovery legislation with which it seemed desirable to combine a considerable amount of economic and social reform. This, in turn, necessitated the creation of many new commissions, boards, bureaus, offices and other administrative authorities,—the alphabetical agencies as they have commonly been called.

The reconstruction finance corporation.

Earliest among these emergency services was the reconstruction finance corporation (RFC). It was established by Congress in 1932 at the suggestion of President Hoover and given functions which have been greatly widened by subsequent legislation. The management of the corporation is vested in a board of directors consisting of the secretary of the treasury *ex-officio*, and six other members appointed by the President with the approval of the Senate.

The chief function of the reconstruction finance corporation is to

provide emergency financing facilities for various institutions and enterprises, including banks, trust companies, building and loan associations, mortgage companies, credit unions, insurance companies, and railroads, as well as for a wide variety of industrial and commercial concerns. This is done by lending money, either directly or through some other government agency. Such loans are made upon adequate security in the form of bonds, debentures, notes or preferred stock issued to the government by the borrower. In addition the corporation has been authorized and directed by law or by executive order to provide funds for various emergency administrative services such as the farm credit administration, the federal housing administration and the federal emergency relief administration. To provide this money the corporation is authorized to issue and sell its own bonds, debentures, notes and other obligations (guaranteed by the government) to the extent of several billion dollars.

Its functions.

The agricultural adjustment administration (AAA) was established in 1933. Although within the jurisdiction of the secretary of agriculture it was placed under the immediate direction of an administrator appointed by the President. The avowed general purpose of the AAA was to promote economic recovery by raising the purchasing power of American agricultural products. This it endeavored to do by production-adjustment programs and other activities designed to assist agriculturists in maintaining a balance between their production and the effective demand for their commodities, thus getting rid of price-depressing surpluses.

The agricultural adjustment administration.

More specifically the administration inaugurated a comprehensive program of crop-production control involving contracts with farmers, planters, and stock raisers whereby the latter agreed to curtail production in return for governmental payments to them. Millions of these contracts were made. Quotas on the quantities of certain agricultural products which may be marketed were likewise established. Various other activities of the administration aimed at the improvement of marketing facilities for agricultural products and sought to eliminate unfair or wasteful competitive practices among the distributors of such products. In the case of certain crops, such as cotton, a national quota was fixed, and allotments were made to the various states on the basis of their past production. These allotments were equated among the individual growers of cotton.

Crop-production control.

Processing taxes.

The financing of this production-control program was provided, at the outset, by the levying of what are known as "processing taxes." These were to be paid by the cotton mills, flour mills, sugar factories, tobacco factories, packing houses, or other concerns which first utilize or "process" the agricultural products which were placed under control. The processor, in turn, was supposed to recoup himself by charging higher prices for textiles, flour, sugar, tobacco, beef, pork, and so on to the consumer.

Declared unconstitutional in 1936.

But many of the concerns which were subject to these processing taxes refused to pay, and carried the matter into court. The issue finally came before the Supreme Court of the United States which decided by a six-to-three vote in the Hoosac Mills Case that the processing tax feature of the agricultural adjustment act was unconstitutional.[1] In making this decision the court did not deny the power of Congress to tax, or to appropriate money; but it denied the right of Congress to make a levy on one group for the purpose of coercing another group into actions which the constitution does not give Congress the authority to control, that is, the methods of agriculture within a single state.

The new agricultural arrangement.

The invalidation of the agricultural adjustment act by this decision left the problem of assisting the farmer unsolved, and Congress immediately turned its attention to other means of gaining the desired ends within the limits of the constitution. Various ways seemed to be open, as for example the levying of a regular excise tax on processed farm products and the payment of subsidies to farmers for soil conservation, or, as an alternative, the diverting of proceeds from customs duties to such forms of agricultural relief as would not infringe the reserved powers of the states.

National recovery administration.

The national recovery administration was established in 1933 to administer provisions of the national industrial recovery act. At the outset a single administrator was placed in charge, but later the work was transferred to a board. The broad purposes of the national industrial recovery act were to increase employment and to raise wages, thereby augmenting the purchasing power of the country. It also sought to procure the elimination of unfair competition by placing all members of the same industry on an equal basis as regards maximum hours of labor and minimum wages. To achieve these ends it was provided that each industry should

[1] U. S. *v.* Butler *et al.*, 80 L. Ed. (Advance Opinions) 287–306.

agree upon a code of fair competition applicable to itself and submit this code to the national recovery administration for approval. To receive such approval a code was required to include provision for collective bargaining (pp. 448–449). Upon approval it was provided that each code would have the force of a federal statute, the enforcement of the code provisions being vested in the first instance with a code authority, chosen within the industry itself, but with the ultimate enforcing authority vested in the national recovery administration.[1] Industries operating under approved codes were likewise to be exempted from the provisions of the federal anti-trust laws.

As originally conceived, the plan was to have a code for every industry, big and little. This, however, meant a great multitude of codes and the task of enforcing them all became a physical impossibility. To a considerable extent the original plan had broken down in 1935 when the Supreme Court declared the entire law to be unconstitutional.[2] Congress thereupon established a greatly modified arrangement which encouraged the making of codes of fair competition on a voluntary basis and provided exemption from the anti-trust laws in the case of all industries which conform to certain requirements as to hours of labor, minimum wages, and collective bargaining.

Federal emergency relief administration.

When it became apparent, in 1933, that the states and municipalities could not carry the burden of relief due to unemployment, Congress authorized a large appropriation to aid the states in meeting their relief costs. To supervise the allocation of this money a federal emergency relief administration was established. Much of the relief was given by means of a civil works program which provided employment at prevailing wage rates on public enterprises in the states and in their political subdivisions, but direct relief in the form of food, clothing, shelter and money allowances was also provided. In due course the civil works program was replaced by a nation-wide public works project under the public works administration. Meanwhile the national government decided that all employable persons on direct relief were to be transferred to the works progress program, leaving the unemployables to be supported by the states and municipalities.

[1] Pending the framing of these various individual codes a "blanket code" was framed and all concerns employing labor were asked to signify their acceptance of it. On doing so they were given the privilege of displaying a special insignia, the Blue Eagle.

[2] The decision, which was unanimous, is discussed *below*, p. 442.

The federal emergency administration of public works.

The federal emergency public works administration (PWA), which took over the civil works program, was established to promote recovery through the construction of useful public works. The secretary of the interior was appointed to serve as administrator for this public works program, assisted by a special board of public works. Allotments for work on federal projects were made by the PWA to the various government departments; in addition money was alloted to the states and their subdivisions both by grants and by loans. No grants were made to private concerns but some loans were made to railroads and certain other corporations for projects that could be considered as of a public nature.

Works program and works progress administration.

The works program was subsidized by Congress in 1935 by an appropriation of nearly five billion dollars. The program is headed by the President himself and he passes on all allotments to the states but is assisted in this by an advisory committee on allotments. A works progress administration, with an administrator at its head, is responsible for getting the program expedited after the allotments have been made. The purpose of the works program is to take all employables off the relief rolls and provide them with employment until such time as industry can absorb them. They are paid at rates which are sufficient for maintenance but lower than the prevailing rates for similar work in private employment.

Housing division and emergency housing corporation.

As a branch of the public works administration a housing division and a housing corporation were also organized. Their purpose is to promote a program of slum-clearance and low-cost housing. They do not make loans to individuals but can assist any properly constituted public bodies such as state housing authorities or municipalities to undertake low-cost, low-rental, large-scale housing projects. Groups of sponsoring private citizens, organized on a non-profit basis, may also be aided in this way. Where housing projects are constructed by the federal authorities they may be leased to and managed by local groups on approved terms.

Federal housing administration.

The foregoing agencies should not be confused with the federal housing administration which was established under the provisions of the national housing act in 1934. Its function is to insure banks and other lending institutions against losses on loans made by them for house construction, home renovation and the purchase of household equipment such as refrigerators or furnaces. No loans to individual borrowers are made by the FHA. It merely guarantees to reimburse banks and other credit institutions for not exceeding

twenty per cent of the losses which they may incur through making loans to private individuals within the limitations prescribed. To obtain the benefit of this twenty-per-cent insurance all loans must have the approval of the FHA at the time that they are made.

Resettlement administration and subsistence homesteads agencies.

Then there is the resettlement administration which includes a division of subsistence homesteads operating through a federal subsistence homesteads corporation. The purpose of the resettlement administration is to assist the transfer of destitute and low-income families from overcrowded industrial communities to areas where they can be self-supporting. It is also concerned with the project of rehabilitating rural workers by making subsistence homesteads available for them. To this end it has adopted the policy of creating homestead communities in which garden homesteads or subsistence homesteads are built and sold on easy terms to those who will occupy them. An industrial worker's garden homestead consists of a small house and one or two acres of land which he is supposed to cultivate in his spare time. A subsistence homestead comprises a house with a much larger acreage together with the necessary outbuildings, stock, tools, seed, and fertilizer to make a start. Repayment is made in monthly payments over a thirty-year period. Projects involving reforestation and flood control are also under the direction of the resettlement administration.

Civilian conservation corps.

Everyone has heard of the civilian conservation corps (CCC) which is officially known as the emergency conservation work organization. Its management is vested in a director who is assisted by an advisory council representing the war, interior, agriculture, and labor departments. The purpose of the organization is to provide work for unmarried, unemployed men (between the ages of 18 and 25) in civilian conservation camps where they work on roadbuilding, fire prevention projects, the improvement of national forests, and so forth. After working hours an educational program is provided. Men are selected for the camps under the supervision of the department of labor, but the camps are maintained under the direction of the war department which has charge of transporting, feeding, and housing the men. The work which the men do in the camps, however, is laid out and supervised by the forest service and the national parks service in their respective areas. Applicants are enrolled for six months at a time. Virtually all the work is done on publicly owned land

but Congress has authorized an extension to private lands where the project is demonstrably of public benefit, as, for example, in the checking of soil erosion which aggravates flood conditions.

National youth administration.

In 1935 an executive order established a national youth administration. The purpose of this organization is to find employment in private industry for unemployed young men and women, likewise to train them for industrial, technical, and professional employment opportunities. In addition its duty is to provide for the continued attendance of needy youths in high schools and colleges. Work projects are also devised under its direction to meet the needs of youths who are capable of being employed on them.

Miscellaneous agencies.

The foregoing catalogue does not by any means exhaust the list of emergency services. There are at least a score of others such as the alcohol control administration, national resources board, national emergency council, national mediation board, Tennessee Valley authority, commodity credit corporation, petroleum administrative board, central statistical board, electric home and farm authority, national labor relations board, the United States information service, the national reëmployment service, the rural electrification administration, the soil conservation service, federal surplus relief corporation, and so on. In most cases the general functions of these agencies are indicated by their titles, and in any event the details are hardly worth enumeration because they can be so readily found in the *United States Government Manual.* In fact one need only glance through this ponderous volume of nearly six hundred pages to realize what an expansion of federal administration has taken place in the United States during the past few years. And the whole picture is being altered day by day.

Conclusion.

The administrative services of the United States now constitute a huge and highly complicated mechanism which has spread itself from the national capital into every nook and corner of the land. Each department, bureau, board, and office has its functionaries scattered all over the country. Despite assurances to the contrary, many of these officials have been given their places as a reward for party service. Consequently they do not represent a high standard of administrative efficiency. It is a commonplace that laws are no better than the men who administer them, but no commonplace of statesmanship has been more flagrantly disregarded than this

one. The most immediate need of the American governmental system today is not a conveyance of greater powers to the national government, or more laws, or more executive orders, or a further elaboration of the administrative machinery. More urgent than any of these is the need for a more competent and better-trained administrative personnel in all ranks of the government service.

This improvement can only be secured by making the public service a career of such attractiveness and security of tenure that it will draw young men of ability into it and keep them there. It is futile to talk of effective, long-range economic or social planning so long as we maintain in full vigor a spoils system which is the very negation of all that planning implies. It is idle to expect that the economic life of the nation can be guided into proper channels by men whose chief claim to a place in the public service is the fact that they have failed to make headway in private vocations. No new deal in this or any other country will prove an enduring success until the thousands of subordinate public officials to whom its routine work of administration is entrusted are chosen on a merit basis, accorded a reasonable degree of security, and properly trained in the work which they are expected to do.

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CHAPTER XV

THE SENATE: ITS ORGANIZATION

The Senate has been extravagantly praised and unreasonably disparaged. . . . It is just what the mode of its election and the conditions of public life in this country make it.—*Woodrow Wilson.*

Swaying and rustling.

Like a great forest which has grown to maturity, and in which all the trees are of about the same size, the Congress of the United States is hard to view appreciatively from any angle. The swaying of branches and the rustling of leaves confuse the vision and afford no real comprehension of where the roots go or how they are nourished. The public eye sees Congress in motion, swaying and rustling, its motion in many instances serving no more effective purpose than does the wail of a forest primaeval; but the public mind does not comprehend Congress in its manifold aspects,—its complex structure, its diversified work, its devious methods, and its changeable moods.

A terminological inexactitude.

The average American, in fact, does not even take the trouble to use the term Congress in its correct legal sense. By Congress he means, in most cases, the House of Representatives, although the constitution explicitly states that it shall consist of both the Senate and the House. Thus he will tell you that somebody served a term in Congress and then went to the Senate. This habit of using political terms loosely ought to be avoided because inexact terminology is the handmaid of disheveled thinking. An error is never so firmly entrenched as when it becomes rooted in the common speech.

Why the double-chamber system was first adopted:

The Congress of the United States and the Parliament of the United Kingdom are the world's two most important lawmaking bodies. Both are bicameral bodies, that is, they are composed of two chambers with somewhat unequal powers. During the Revolutionary War and under the Articles of Confederation the common affairs of the thirteen states were managed by a congress which consisted of a single chamber. The results left much to be desired, hence it was decided by the constitutional convention of 1787 that the new government should provide a legislative

1. In the interest of safety.

body of two chambers. This decision was reached with practical unanimity, as it seemed inadvisable to vest in a single chamber the great legislative authority which would ultimately be exercised by the new federal government.

2. To guard against legislative centralization.

Moreover there was a strong desire to provide, in the new national government, some safeguard against the future growth of legislative centralization. Otherwise the federal government might gradually crowd the state governments out of the way and usurp the whole field to itself. This could best be prevented by giving the states, as states, control over one of the new federal chambers. In other words the adoption of the double-chamber principle was dictated, in part at least, by the feeling that there were two elements to be represented, namely, the states as states, and the people of the country without reference to the states in which they lived. State sovereignty and popular sovereignty should thus be tied together, each a check on the other.

3. Because other countries had two chambers.

Again, the advisability of setting up two chambers seemed to be indicated by the lessons of experience which had proved the tendency of all single assemblies to yield to the impulse of sudden and violent passions, and to be stampeded into hasty or ill-advised action. England had her Lords and Commons. Most of the colonies, likewise, had maintained two legislative chambers, while all of the new state constitutions except those of Pennsylvania, Georgia, and Vermont had made provisions for a two-House system.

4. To ensure conservatism.

The bicameral system, again, was in part the reflection of an intense desire for stability in government. In 1787 the country was tired of strife, turmoil, and experimentation. It had been given its new deal and was satisfied. For twelve years it had been keyed up by one excitement after another and regaled with fantastic proposals of every sort. The leaders of the people wanted a government that would keep the country at peace, maintain order, protect private property, and let the citizen alone. All this called for the creation of a second chamber which would serve as a rein on the first. It would be chosen in a different way and would reflect a more deliberate point of view. Incidentally there was the practical consideration that only by setting up two chambers could the terms of the first compromise be carried into effect.[1] It is true that a double-chamber system was agreed upon before

[1] See *above*, pp. 48–49.

the dispute which led to this compromise became acute, but the compromise sealed the matter beyond the possibility of reopening it. So a House of Representatives and a Senate were established to form the Congress of the United States.

Has the reasons proved good?

Has this arrangement matched up to the expectations of the men who planned it in 1787? For the most part it has. The House has been a reasonably good mirror of the popular mind, although at times inclined to drive ahead too fast. So long as members of the Senate were chosen by the state legislatures, as was the case down to 1913, they represented a more conservative group and formed a council of elder statesmen which gave stability to the process of lawmaking. But since the adoption of the seventeenth amendment the senators have been elected by popular vote and the differentiation between the two Houses, in their general inclination, is no longer what it used to be. Today one cannot say that either chamber is likely to be more conservative or more radical than the other. Nevertheless the mere fact that a measure must be considered by two chambers gives a certain amount of protection against hasty and ill-considered legislation.

The constitutional basis of representation in Congress.

The basis of representation in the Congress of the United States remains the same. The people of the states, as such, are equally represented in the Senate—each state having two senators. The people of the nation, on the other hand, are represented by a varying number of representatives in the lower branch of Congress, the House of Representatives. But in both cases the unit of representation is the state. Representatives, like senators, are apportioned to states and not to congressional districts. Occasionally they are chosen by the voters of the whole state.[1] Thus Congress, in both its branches, is a body of state representatives; in a legal sense its members are officers of the states from which they come, and not officers of the national government.

Reasons for the original method of choosing senators:

In the constitution, as originally adopted, it was provided that senators should be chosen by the legislatures of the several states. In adopting this method two purposes were in view. First, it was the idea that the Senate would be a small body of men who had gained political experience and distinction in their own states—men who had served in the state legislature or in other public offices. Demagogues might win at the polls and get seats in the House, but they would not find it easy to stampede the

1. The desire for experienced lawmakers.

[1] See *below*, pp. 302–303.

state legislatures into sending them to the Senate. Thus the Senate would serve as a check upon dictatorship, if the President should ever aim to become a dictator, and it would also be a counterfoil to the tyranny of the multitude, if the House should ever succumb to the influence of mass emotion as expressed at the polls. "Give all the power to the many," said Alexander Hamilton, "and they will oppress the few. Give all the power to the few and they will oppress the many." Safety, it was felt, might be achieved by having the senators chosen by the few and the representatives by the many.

2. To guarantee the permanence of state legislatures.

Moreover there was a very practical reason for entrusting the selection of senators to the legislatures of the several states, namely, that this would guarantee the permanence of these legislatures themselves. It would provide an assurance that the state governments would never be snuffed out. This possibility was what a great many people feared in 1787, and not without reason, for it was what had happened in earlier federations. So the framers of the constitution geared an important wheel in the national machine directly to the mechanism of state government. This meant that the state legislatures could never be eliminated without bringing down one branch of Congress as well. For if the time ever came when there were no state legislatures there could be no senators. This link between the Senate and the state legislatures was broken by the seventeenth amendment in 1913, but not until the state legislatures had discarded all fear of their ever being crowded out by the expansion of congressional power.

Older plan of choosing senators.

These reasons for giving the state legislatures the right to elect the senators were good reasons in 1787, and the method encountered very little objection for many years. During more than a century the legislatures did the choosing, as the constitution originally provided. In due course, however, there developed a feeling that senators as well as representatives in Congress ought to be chosen by direct popular vote. This agitation began as early as Andrew Jackson's day, but it did not make much progress until after the Civil War. Then it gained momentum from several sources. The country began to feel that there was too much "invisible government" in the selection of senators, too much spending of money, too much bossism.

Objections to it.

And there were reasons for this feeling. The real selection was not usually made by the legislature in open session, but by a secret

caucus of the majority members. Often it was the result of deals and dickers which would not bear the light of day. Far from choosing men of ripe experience, legislatures frequently allowed their choice of senators to be dictated by unworthy motives. Partisan service, or the support of some great financial interest, without any other qualification, placed many senators in their seats. The dictation of political bosses counted for more with members of state legislatures than the promptings of their own judgment or the call of public opinion. Sometimes, moreover, the process of election broke down, ballot after ballot being taken for months in a state legislature without anyone obtaining a clear majority. In this way a state was occasionally deprived of its representation in the Senate over considerable periods of time.

Its abolition.

As a result of these various objections the old method of choosing senators became steadily more unpopular and projects for changing the constitution so as to permit the direct election came to the front in the closing decades of the nineteenth century.[1] Several times the House of Representatives passed by the requisite two-thirds vote a proposition to submit such an amendment to the states for their approval, but the instinct of self-preservation led the Senate to refuse concurrence. Ultimately, however, the pressure of public opinion compelled the Senate to give way and the seventeenth amendment established a new method for the election of senators. It provides that senators shall be chosen directly by the voters of the several states, not by the legislatures. But the six-year term and the requirements for eligibility remain as before. A senator must be at least thirty years of age, a citizen of nine or more years' standing, and at the time of his election an inhabitant of the state which he is to represent.

The new plan.

One third of the Senate's membership is renewed every two years, hence no state elects both its senators in the same year unless some unexpected vacancy occurs in one of the senatorships. The choice is made by voters at the regular state election. Each state determines by its own laws how candidates for the Senate shall be nominated—whether by party conventions or by direct primaries. Some states use one method and some use the other.

Power of the Senate to refuse a seat.

But while each state has the right to decide for itself the methods of nominating candidates, and the amount of money which these candidates may legally spend in their nomination campaigns, the

[1] George H. Haynes, *The Election of Senators* (New York, 1906).

Senate itself has a good deal of control over such matters. This does not arise from its power to judge the "elections, returns and qualifications" of its own members, for the Supreme Court has ruled that the primaries do not form part of the elections within the meaning of this constitutional provision.[1] But there is no way in which a newly elected senator can take his seat in the Senate until after he has been given the oath of office, and the Senate can decline to permit the taking of this oath by anyone whom it deems to have gained his nomination (as distinct from his election) by methods which it disapproves. Thus, in 1927 the Senate voted a refusal to allow the oath of office to be administered in the case of two senators-elect, one from Illinois and one from Pennsylvania, on grounds of alleged over-expenditure in securing their respective nominations.

Is this power being abused?

One may well raise the question whether the Senate is within its constitutional rights in resorting to this method of excluding new members whom it does not care to have in its midst. The power is open to serious abuse. If a mere majority in the Senate can refuse the oath of office to a newly elected member because it does not approve his procedure in getting nominated, there is no reason why it cannot refuse the oath on any other ground,—because the newly elected senator is a socialist, a pacifist, a corporation lawyer, or a political boss, for example. The intent of the constitution is that each state shall choose its senators, subject only to the qualifications which the constitution lays down, and in accordance with methods of election which the federal laws prescribe. It was not intended to give the Senate any right to veto the states' selection by refusing the oath of office to anyone whose preëlection record happens to be disapproved by a majority of the senators.

Filling vacancies.

Under the provisions of the seventeenth amendment, when a vacancy occurs through the death, disqualification, or resignation of a senator from any state, the governor "shall issue" a writ of election to fill such vacancy. But the mandatory requirement is in fact a discretionary one. There is no process whereby a governor can be compelled to issue such a writ unless he chooses to do so. And when the date for a regular election is not too far away he

[1] Newberry *v.* United States, 256 U. S. 232 (1921). See also Spencer Ervin, *Henry Ford vs. Truman H. Newberry: A Study in American Politics, Legislation and Justice* (New York, 1935).

usually issues no writ but makes a temporary appointment. This he may do, under the provisions of the amendment, if the legislature of his state has so empowered him, as virtually all the state legislatures have done.

Results of the new plan.

Great things were expected from the new method of choosing senators, but great things have not resulted. The personnel of the Senate has not conspicuously improved since the seventeenth amendment went into operation. Quite as much money is now spent in senatorial campaigns as before 1913, and probably more, with this difference, that it is now spent in getting votes from the people, not from state legislators. Political bosses do not find the new system so easy to manipulate as the old; but political demagogues find it easier. The advantage now goes to the candidate who is a good forager for notoriety and can catch the imagination of the multitude with his scintillating array of promises. The average of ability in a lawmaking body is not an easy thing to measure, but there are no indications that it has risen in the Senate of the United States during the past twenty-five years. Nor is there any evidence that the Senate of today stands higher in the public esteem than did its predecessor of a quarter-century ago.

Equality of representation in the Senate must remain.

The seventeenth amendment made no change in the equal representation of the states, although, with the present great disparity of population among the various commonwealths, this feature has become a conspicuous anomaly. Nevada, with about 80,000 population, has two senators, while New York, with nearly 12,000,000, has the same number. Proportionally, New York would have about three hundred senators. The population of Illinois is about the same as that of all the New England states combined; but Illinois has two senators, while New England has twelve. Put together the states of Arizona, Delaware, Idaho, Maine, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. Here are fifteen states, controlling almost one third of the Senate. Yet their total population is only about seven per cent of the national figure. On the other hand the five most populous states of the Union have a third of the national population, yet elect only about ten per cent of the senators.

Thus works the principle that states, like men, are created equal. Nevertheless this equality is the result of a bargain between the

Although it is not constitutionally binding.

larger and the smaller states which was intended to be irrevocable. The constitution contains a stipulation that no state, without its consent, shall ever be deprived of its equal representation in the Senate. This provision is not legally unchangeable, of course, for there is no way in which the ultimate sovereignty of the people can be restricted in this or any other matter. If a constitutional amendment changing the equal representation of the states in the Senate were to be passed by a two-thirds vote in both Houses of Congress and then ratified by three fourths of the states, it would be perfectly valid. But there is no chance that three fourths of the states would ratify such an amendment. The smaller states naturally set a high value upon their prerogative of equal representation, and there are enough of these states to prevent the adoption of any amendment which takes it away.

The existing anomaly has some merits.

In any event one should not be too much disturbed by anomalies in government. Every country has its share of them. Indeed it might almost be said that the better a country's government the less logical its conformation is likely to be. The British constitution is studded with anomalies, yet the United Kingdom is far from being the worst-governed commonwealth on earth. Even if it were possible to rationalize the basis of representation in the United States Senate, there is no certainty that such action would prove wise in the long run. The Senate represents geographical areas; the House represents numbers. A majority of the House membership comes from ten states of the Union. Were it not for the principle of equal representation in the Senate these ten states could control the legislative policy of the nation. But under the present arrangement it takes twenty-five states to control a majority. The country east of the Mississippi and north of Mason and Dixon's line dominates the House, but it does not control the Senate. The West and South can outvote it there. Thus the principle of balance and counterpoise, both numerical and sectional, is established and preserved.

It can be defended.

Let us not think of Congress as the legislative body of a homogeneous nation but rather as the council and the assembly of a league of states. We have in the United States a sectional diversity which roughly corresponds to Europe's nationalism. North Dakota and Louisiana are under one flag, but they are as unlike in physical conditions, in social texture, and in economic interests as are Denmark and Portugal. The Senate represents this diversity,

within the borders of the land, in a way that the House does not. Bear in mind that it is not people alone, but land and people that make a nation. New Jersey does not necessarily have twice the importance of Kansas in the nation's life because she has twice the population. From this point of view the equal representation of the states can perhaps be defended. The Senate reflects not merely the size, but the variety, the range, and the breadth of these United States.

Organization of the Senate.

The Senate of the United States holds its regular sessions each year in its own chamber at the national capital. It may also be called by the President in special session, even when the House of Representatives is not sitting. This is because the Senate has some special functions which are not shared by the other branch of Congress, namely, the trial of impeachments, the confirmation of presidential appointments, and the approval of treaties. Such special sessions have been called on a number of occasions to confirm treaties; but no special session of the House of Representatives has ever been summoned without the Senate being also called, for there is virtually nothing of general importance that the House can do without the Senate's concurrence.

Its presiding officer.

By the terms of the constitution the Vice President of the United States is the Senate's presiding officer, and he possesses the customary duties of that post. But he appoints no committees and has no vote except in the case of a tie. In the earlier days of the Union, when the Senate was a small body of less than thirty members, tie-votes were not uncommon; but nowadays, with the membership increased to ninety-six, the Vice President rarely gets the opportunity to give a casting vote. In the absence of the Vice President the Senate elects a president pro tempore, who continues to vote as a regular member but has no power to break a tie-vote. It also chooses its other officers, sergeant-at-arms, chaplain, and clerks.

Its procedure.

The Senate makes its own rules of procedure.[1] On the whole these rules are simple, far more so than those of the House. They require that every bill or joint resolution shall receive three readings before being passed, but the first two readings are merely nominal and are given before the bill is referred to the appropriate

[1] The Senate's rules are permanent. They do not have to be readopted at the beginning of each Congress as is the case with the rules of the House of Representatives. This is because the Senate is a continuous body, with two thirds of the membership holding over from one Congress to another.

committee. The real contest, if any, comes upon the occasion of the third reading, when the bill is considered in committee of the whole and amendments may be offered. No general priority is given in the Senate, as in the House, to any class of measures, except that appropriation bills have a certain precedence. Debate in the Senate is not limited, as in the House; there is ordinarily no limit on the time that a senator may occupy, and no provision for bringing a debate to an end by moving the previous question. Since 1917, however, it has been possible for the Senate, by a two-thirds vote, to restrict each senator to one hour and shut off all amendments except by unanimous consent, thus bringing any debate to an end within a reasonable time.[1]

Effect of procedure upon work.

The Senate, as a body, is not easy to lead. There are floor leaders who have charge of measures but they do not dominate the debates as floor leaders do in the House of Representatives. Leadership in the Senate does not have a high degree of visibility, for the senators are a sharply individualist group and not very tractable. The rules, moreover, do not lend themselves to the maintenance of party discipline. Rebels and mavericks are permitted a freedom in the Senate which the House would never tolerate. Being a relatively small body, however, the need for firm leadership is not so urgent as in the House which is over four times as large. Most of the Senate's meetings are public, but it may vote at any time to go into "executive session" behind closed doors. This it sometimes does when the confirmation of appointments is under discussion. Treaties, on the other hand, are considered in open session.

Its committees.

Like all legislative bodies, the Senate does a large part of its work through standing committees, of which it now has about thirty-five. Some of them are important and have substantially the same designation and jurisdiction as the chief committees in the other chamber; but others have only perfunctory work to do and rarely meet at all. The most important committees of the Senate are those on finance, appropriations, foreign relations, the judiciary, naval affairs, and interstate commerce. The first two have the consideration of all measures affecting revenue and ex-

[1] Senate Rule, No. 22. The rule provides that any sixteen senators may file a petition to close the debate, and when the Senate votes by a two-thirds majority to do so, no dilatory motions are in order and no amendments save by unanimous consent. This rule causes the debate to be limited to as many hours as there are senators desiring to speak.

penditures respectively; the next two owe much of their importance to the fact that all the President's appointments to the diplomatic service and to federal judgeships are referred to them. Likewise, the committee on foreign relations considers all treaties before they are discussed by the Senate as a whole. The committee on interstate commerce has the preliminary consideration of measures relating to the supervision of railroads and other interstate utilities. Senate committees contain from three to seventeen members, and every senator is sure to be assigned to one or more of them. The Senate also meets in committee of the whole for the detailed consideration of measures.

How committees are chosen.

The selection of the various committees is made, at the beginning of each Congress, by special committees chosen for that purpose by the caucus of each party. These special "committees on committees" make up a slate or list of committee assignments, and this is ordinarily accepted by the two caucuses and then by the Senate without change. Invariably, of course, the majority party in the Senate is given a safe margin on every committee of importance. Each committee has its chairman, who is named on the slate in the same way, but in the naming of these chairmen it is usual to respect the principle of seniority. Senators of the majority party who have had long service, especially on particular committees, are given the important chairmanships. Every committee, moreover, has its "ranking member," the one who stands next to the chairman in order of seniority and hence is in line for promotion to the chairmanship when a vacancy occurs, provided his own party retains a majority in the Senate. Senators often stay on the same committees year after year and thus acquire a familiarity with their work. The Senate, it will be recalled, is a quasi-permanent body; not more than one third of its members going out of office at any one time, so that there is never any need for a complete reorganization of its committees.

The steering committee.

Mention should be made of one committee which is not provided for by the rules of the Senate but which is of prime importance nevertheless. This is the steering committee, so called, which is supposed to be named by the caucus of majority senators, but which is virtually chosen by the majority leader whom the caucus selects. Its work is to determine what measures most urgently need to be passed, and then to "steer" these measures through the Senate. It was established to make control in the

Senate more effective and to enable the majority leaders, by cooperating with a similar committee in the House, to unify the program which they are endeavoring to carry through. The steering committee has helped along these lines, but discipline in the Senate is still rather lax. Every senator who is strongly interested in a bill desires to be his own floor leader.

Freedom of debate in the Senate: its merits and defects.

The unique freedom of debate which prevails in the Senate has some great advantages in that it encourages full discussion; it gives minorities a chance to fight for compromise and to hold up action until public opinion has had an opportunity to make itself felt. But so great a latitude in debate may easily be abused, and it sometimes has been abused. It has occasionally given a factious minority the opportunity to wear out the endurance of the majority by conducting a "filibuster," as it is called. When the Senate's session is drawing to its close, this permits a relatively small group of senators to defeat a measure by resort to dilatory tactics (such as making long speeches, proposing amendments, demanding roll calls and so forth) and many measures have perished in this way. Indeed it can fairly be said that legislation in the closing days of the Senate's session virtually requires unanimous consent. Everyone who is old enough will remember, for example, how "a little group of wilful men" in the Senate determined to prevent the arming of American merchant vessels for self-protection in the spring of 1917 when German submarines were sinking neutral ships. It was this action that caused the Senate to adopt its famous Rule No. 22 which makes possible the placing of a one-hour limit on speeches.[1]

Quality of the debates.

Notwithstanding the opportunity for long speeches, the Senate's debates do not now reach the high standards of bygone days,—the days of Webster, Clay, Calhoun, Hayne, Benton, Douglas, Seward, and Sumner. Speeches of sterling quality are still occasionally delivered when some matter of special solemnity gives the occasion; but senators nowadays do not set out to convert their colleagues by eloquence. If a senator has the urge to unburden himself of a great oration he chooses a banquet or a convention, with a radio hook-up, as the best place for his effort. Strangely enough, it is sometimes easier for a senator to get the ears of the people than those of his own colleagues. By the way, it is not the practice of the Senate, as it is of the House, to give members

[1] *Above*, p. 270, *footnote*.

"leave to print" in the *Congressional Record* speeches which they have not delivered.

Comparison with other countries.

The standards of debate in the United States Senate are not noticeably below those of the British House of Commons, and they are certainly above those of legislative bodies in other lands. Legislative eloquence has suffered an eclipse—not merely in this country but everywhere. People have to read and hear so many speeches that only the outstanding personalities can count on getting a long speech listened to or read by any considerable circle. Time was when many speeches in the Senate were reported by the newspapers verbatim; today a senator feels himself honored if his weighty pronouncements receive a half-column summary. It is true that bizarre utterances and exchanges of left-handed compliments on the floor of the Senate still afford an inspiration to the makers of newspaper headlines; but serious speeches do so on the rarest occasions only.

Influence of the party spirit.

The party whip cracks as frequently in the Senate as in other legislative chambers although perhaps not so sharply. Its custodian is the caucus.[1] Each party, majority or minority, has its own caucus, made up solely of its own members, and at these meetings the attitude of each group is decided. The majority senators, whether Republicans or Democrats, agree as to the measures which they will support; the minority members, on the other hand, map out their counter-operations, deciding whether to oppose, offer amendments, filibuster, or to let things go through. Only the majority party, however, uses the caucus to any considerable extent.

The caucus system in the Senate.

Every senator who attends his party caucus is bound to abide by any decision which the caucus may make, bound by a merely moral obligation, to be sure, but that is enough for all practical purposes. Thus it comes to pass that when a majority caucus has pledged its members to support any measure, the ultimate issue is virtually sealed. The majority, being pledged by caucus resolution to stand together, can ensure its enactment. Not infrequently, however, the Senate includes a number of insurgents who will not attend any caucus and hence are not bound by what the caucus of either party may do. These intractables may caucus by themselves, or they may leave each rebel to decide for himself. If there are enough of them, as sometimes happens, they can force a regular

[1] The Republicans call their caucus a "conference."

caucus to make compromises with them. Party discipline among Republican senators has been greatly weakened during the past half-dozen years and even among the Democrats it is not so well maintained as it used to be.

Merits and defects of the caucus.

In the Senate, as in the House, vigorous protests against the caucus system have been voiced from time to time, and there is throughout the country a good deal of prejudice against caucus legislation; but the system provides the only way in which responsibility for legislation, under a system of divided powers and partisan government, can be adequately centralized. When a majority caucus pledges its members, this means that the party is ready to take the entire responsibility for some action. Reformers are continually urging that the Senate should replace "irresponsible party action in a secret conclave" by some form of "public, personal, and individual responsibility"; but the whole history of representative lawmaking proves that no well-ordered legislative program is ever carried through by placing emphasis upon the duty of every legislator to be his own leader. The legislative caucus, or something akin to it, exists in all countries having systems of free government. It is not, as some imagine, a vicious affair which the politicians of America have devised for their own benefit.

Privileges and immunities of senators.

The Senate has the customary rights of a legislative body, and its members enjoy the usual immunities. They are privileged from arrest on civil process during their attendance, or in going to, or in returning from the sessions. For what a senator may say in the course of a debate, moreover, the constitution provides that he "shall not be questioned in any other place"; in other words, he is not subject to the ordinary law of libel as administered by the courts. But the Senate itself can punish a member for disorderly conduct and by a two-thirds vote may even expel him. It may compel the attendance of absent senators, may conduct investigations, may summon witnesses, and in the event of their refusal to appear or to answer questions, may cite them to the courts to be punished for contempt. This power to conduct investigations has been freely used by the Senate in recent years through the appointment of investigating committees. The scope and importance of this power will be explained a little later.[1]

In political influence and prestige the Senate was for a time inferior to the House. The House, in the early days of the Republic,

[1] *Below*, p. 293.

took the initiative in legislation of all kinds, while the Senate devoted its time to revising the measures which came up from the lower chamber rather than to originating bills of its own. It was a small body, regarded by the public as a council of provincial notables which young statesmen of brilliant political talents did well to avoid.[1] There was a common impression that senators had little freedom to decide questions for themselves, but that like envoys they merely followed the instructions of their own state legislatures.

The place of the Senate in American political history:

These legislatures, in early days, often gave instructions to their senators, thus following a practice which had developed in the Congress of the Confederation and the constitutional convention of 1787. In the original Senate chamber there were no seats for the public, and what went on in this chamber attracted very little public attention. Madison, on one occasion, remarked that being desirous of increasing his reputation as a statesman, he could not afford to accept a seat in the Senate. The center of political gravity during this period, which extended from 1789 to about 1830, was lodged in the House.

1. From 1789 to 1830.

But during the era of Andrew Jackson this situation began to undergo a change. The abolition of the congressional nominating caucus, which the House through sheer weight of numbers always controlled, reduced the influence of that body.[2] The Senate began to come into its own. Men of power and reputation entered the Senate during the era which intervened between the inauguration of Jackson and the Civil War—Webster, Clay, Calhoun, Hayne, and others. The outstanding political questions of this epoch were connected with the issue of states' rights, and the Senate, as the chamber representing the states, became a forum of lively discussion.

2. From 1830 to 1870.

The slavery issue also lifted the Senate to the front in American national politics. For the controversies and compromises on the admission of new states centered about the ultimate control of the Senate by the pro-slavery or anti-slavery sections of the Union. The permanence of its organization, the longer terms for which its members were chosen, its smaller and more wieldy size, the reputation for eloquence in debates which it developed—these things

[1] Henry Jones Ford, *The Rise and Growth of American Politics* (New York, 1911), pp. 260–261.

[2] For an account of this caucus and its abolition see *above*, p. 145.

helped to transform the Senate into an arena where the great national issues of the pre-war period were fought out. Both at home and abroad the Senate gained a name for talent, dignity, and aggressiveness.

3. From 1870 to 1913.

Then came the inevitable reaction. By its undue emphasis upon "senatorial courtesy" and by its disposition to hamper the hands of the executive in foreign affairs, the Senate overreached itself. Presidents Grant and Garfield each took a hand in clipping its wings, the former by rebuffing its claims to any control over removals from office; the latter by defying its rule of courtesy. Questions of economic policy, moreover, now came to the front, and in its handling of these the sectional spirit of the upper chamber cropped out too plainly. The growth of huge corporations and of great fortunes brought new elements into its membership. Senators who owed their selection either to personal wealth or to the fact that they were backed from opulent sources began to invade the upper chamber and to dominate it. The number of senators who owed their seats to intellectual eminence or to political experience grew steadily smaller as the years went by. The Senate began to stamp itself upon the public imagination as the stronghold of vested economic interests and the foe of popular rights.

4. Since 1913.

Finally, some changes resulted from the new method of electing the senators as provided by the seventeenth amendment. The older group of senators made up of such men as Depew, Aldrich, Foraker, and Knox, so closely allied with big business, began to dwindle, and presently the Johnson-Blease-Norris-Wheeler-Huey Long fraternity of more radically minded senators began to come in. Nevertheless the prestige of the Senate was still strong, and it gained strength by the victory over President Wilson on the League of Nations' issue. But during the Coolidge and Hoover administrations the Senate kept slipping, although its own members were probably not aware of the fact. Whether it has regained any of its old-time hegemony during more recent years is a matter on which opinions are likely to differ.

The Senate's future.

Among the facetious but eminently wise political philosophers of his day, Will Rogers had no equal. He used to say that "anyone can get a reputation as an American humorist by keeping his eyes on the Senate and reporting the facts." But it is not quite so bad as that. Since the Senate is a sharer in the executive power, it naturally becomes strong when a weak-willed President occupies

the White House, and the converse is also likely to be true. There has never been a time, however, and probably never will be, when the second chamber of Congress can be termed a secondary chamber. The Senate is not likely to meet the same fate that upper chambers in other countries have encountered, for its constitutional powers are too important.

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CHAPTER XVI

THE SENATE: ITS FUNCTIONS

We shall exult if they who rule the land
Be men who hold its many blessings dear,
Wise, upright, valiant; not a servile band
Who are to judge of danger which they fear,
And honor which they do not understand.
—*Wordsworth.*

The Senate an executive as well as a legislative body.

"All legislative powers herein granted," declares the first article of the American constitution, "shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." It is by no mere slip of the pen that the Senate was given this priority over the House for it was designed to be more than a coequal branch of Congress. The Senate was intended to serve as a sort of executive council as well. When the framers of the constitution declined to make provision for an institution like the English privy council (with which they were quite familiar) it was because they felt that they had assigned to the Senate the most important things upon which it was desirable that the President should have advice. They had in mind their stipulation that he should obtain the "advice and consent" of the Senate on appointments and treaties.

Washington's attempt to make it so.

Washington, during his first term as President, fully expected that the Senate would act as an advisory council, and he sought to have it deliberate with him on certain treaties with Indian tribes which he desired to make. The Senate at this time had only twenty-six members, and hence was not too large for confidential discussion. But the senators did not relish the idea of having the President with them in executive session and declined to confer with him. So the method of personal conference with the Senate quickly gave way to the plan of sending business to it in formal written communications. Thereupon the Senate ceased to be anything like a privy council. Its prerogative became one of consent alone. Senators occasionally grumble nowadays because the President does not observe the letter of the constitution and advise with the Senate

before he nominates his appointees or negotiates treaties; but the present practice is a result of the Senate's own attitude in earlier days.

Appointments

Special functions of the Senate:

The appointing power is one of the greatest powers that an executive can have,—too great, it was felt, to be vested in the President alone. An unscrupulous President might use it to perpetuate himself in office. He might fill the administrative positions in the national government with men whose appointments were dictated, as Hamilton said, by "stale prejudice, family connection, personal attachment, or desire for popularity." He might use the patronage to build up a personal machine of formidable power. So the Senate was given a share in the appointing authority. The initiative in making an appointment belongs to the President; but the final determination of its validity is withheld until the Senate concurs.

1. The confirmation to appointments.

The usual procedure in making these appointments is as follows: When the President has occasion to fill any office he sends a nomination to the Senate, and this nomination, after being announced, is referred to the appropriate committee. If it be the nomination of a federal judge, it goes to the judiciary committee; if that of an ambassador, to the committee on foreign relations. These committees may, and often do, assign such presidential nominations to special subcommittees for investigation. If there are objections to the nominee, the committee or subcommittee hears such objections, and in due course a report is made to the whole Senate. Then comes the vote to consent or to refuse consent. After the vote has been taken, two days of actual session must be allowed to elapse before the action of the Senate is communicated to the President. This provision in the Senate's rules is intended to afford time for reconsideration if the senators so desire.[1] The Senate is not bound, of course, to follow the recommendations of its committees in the matter of confirming appointments; but it does so except in rare instances. If the Senate's approval is refused, the President may submit the same nomination a second time, but this is not often done.

The procedure.

[1] In 1931 the Senate confirmed three appointments submitted to it by President Hoover. But within the time allotted by the Senate's rules it voted to reconsider this action and asked the President to return the nominations, which he refused to do. Thereupon it voted to reject two of the appointments but to confirm the third. Meanwhile all three appointees had taken office and they continued there during the remainder of the Hoover administration.

The rejections.

Rejections have not been numerous, on the whole, but they have at times developed considerable bitterness, especially when the President has been minded to force his nominations through. Much depends, of course, upon whether the Senate contains a majority representing the same political party as the President, and the temper of the Senate with reference to appointments has changed from time to time. It is now generally conceded, however, that the responsibility for making the original selections ought to rest upon the President's shoulders, and that the Senate should not impair this responsibility by refusing to let him have the officials whom he desires. It should, and usually does, content itself with adverse action in those cases where it believes that the President has proposed someone with a dubious past record or present reputation. On the other hand an appointment is never rejected on the ground that the President might find someone better fitted for the post. It is not the Senate's business to guarantee fitness but to keep the unfit out. Only the more important appointments, in any event, require any action from the Senate. The great majority of federal positions are now filled under the civil service rules, as has been already explained.[1]

Has the confirming power been wisely used?

Has the requirement of senatorial confirmation proved to be a wise provision? It has divided the responsibility and has sometimes tied the President's hands in his endeavor to find capable men for high public positions. Time and again, even in recent years, men whom the President has invited to accept appointments have told him that they would not risk the humiliation of being rejected by the Senate. Most presidents would have done as well, or better, without the restriction. A few, perhaps, would have done worse. The chief objection to the plan is that a President occasionally finds himself forced to smother his conscience in the case of some appointments in order to get others through. Moreover, the custom of senatorial courtesy, to which allusion has already been made, has virtually transferred to individual senators the actual choosing of federal officers in their respective states.

Recess appointments.

But not all the blame for the unsatisfactory workings of the confirmation arrangement can be laid at the Senate's door. Presidents have sometimes tried to circumvent the constitutional requirement by making recess appointments and then renewing such appointments after the Senate has rejected them. The rules with respect

[1] See *above*, pp. 189–190.

to these recess appointments have already been explained (p. 186) and they are reasonable enough. But Presidents have not always been minded to observe them in spirit. Occasionally they have intentionally left posts vacant until after the Senate has adjourned in order that appointees whom the Senate would not have confirmed might be put into office.

Treaties

2. The approval of treaties.

The second executive power shared by the Senate is that of approving treaties. In dealing with this matter the framers of the constitution found themselves in a dilemma. If they gave the President sole power to make treaties, they would endow him with an absolute control over foreign affairs including the power to enter into secret military alliances. Naturally they were not prepared to concentrate such far-reaching authority in the hands of any one man. On the other hand, they realized that "perfect secrecy and immediate despatch" are sometimes needed in the making of treaties.[1] And these essentials, it was easy to see, could not be had if the President were forced to submit his negotiations, step by step, to a body of men representing all the states in the Union. In the end a compromise was worked out by giving the President the power to make treaties "with the advice and consent of the Senate, provided two-thirds of the senators concur." Thus two separate powers with respect to treaties were established, the President being given the right to initiate and conduct the negotiations, while the ultimate fate of these negotiations was made dependent upon the willingness of the Senate to approve them by a two-thirds vote.

Reasons for the two-thirds requirement.

The two-thirds requirement was adopted because a somewhat similar provision had existed in the Articles of Confederation and because the framers of the constitution thought of the Senate as a small body—a council, not a legislature. The constitution was to go into force if nine states ratified it and this would give eighteen senators as a minimum. Ten would then suffice to make a quorum. With travelling conditions as they were in those days it was anticipated that on some occasions hardly more than a quorum would be present. That had been the experience in the Congress of the Confederation. It would be questionable prudence to let a very few senators, along with the President, commit the country to a

[1] *The Federalist*, No. 64.

treaty of alliance, hence the two-thirds precaution. The framers of the constitution did not envisage the possibility that some day it would take more than sixty senators to get a treaty confirmed under the two-thirds rule.

How the President and the senators share this power.

In treaty negotiations, as in the selection of persons for appointment to office, the Senate's advice is not asked in any formal way, although on some occasions the President has sounded the Senate before actively beginning treaty negotiations.[1] In any event a President rarely goes ahead and definitely concludes the terms of any important treaty without feeling out his ground. He is likely to keep in touch with the leaders of the Senate, especially with the chairman of its committee on foreign relations, and thus to ascertain in advance what the action of the Senate is likely to be in case a treaty of a certain type is laid before it. No President likes to carry treaty negotiations to a conclusion, only to have the Senate reject his work as it did with the peace treaty which was submitted to it by President Wilson in 1919. A treaty goes into the Senate with the numerical chances two to one against it. In most cases its chances are not even as good as that, for the Senate has all sorts of suspicions about treaties and goes looking for loopholes in them. It behooves the President, therefore, to take the Senate leaders frankly into his confidence at an early stage, otherwise he is likely to find a still-born treaty on his hands. Several presidents have had to learn this lesson. President Wilson was by no means the first among them, for the Senate had already rejected important treaties submitted to it by Presidents Pierce, Grant, Cleveland, Taft, and Theodore Roosevelt.

The way a treaty is made.

The negotiations which precede the signing of a treaty are ordinarily conducted on behalf of the United States by the department of state. This may be done either at Washington or at a foreign capital, the American ambassador or minister acting as intermediary in the latter case. In some cases, especially at the close of a war, special commissioners may be appointed to conduct the negotiations. At the Versailles peace conference of 1918–1919 President Wilson headed such a commission in person. After the general provisions have been agreed upon, the formal document is prepared and signed by the representatives of the countries concerned. Then, but not until then, the treaty goes to the Senate for

[1] President Polk, for example, asked the advice of the Senate with reference to the proposed Oregon boundary treaty in 1846.

approval. The Senate refers the matter to its committee on foreign relations which may hold hearings and listen to objections that may be raised from any source. Thereafter the committee recommends that the treaty be approved, rejected, or amended, and the Senate usually follows this recommendation. But before doing so it goes over the treaty and the committee's recommendations, item by item, in committee of the whole and may consume many days in doing this. This discussion takes place in open session, with the galleries filled, not behind closed doors. The entire procedure favors deliberation and delay while making secrecy quite impossible. If approval is finally given, there is an exchange of ratifications by the two countries and the treaty goes into force, but if the Senate's approval is refused, the whole enterprise comes to naught.

Reservations.

What happens, however, if the Senate amends a treaty, in other words if it ratifies the treaty with various "reservations" attached? The Supreme Court has ruled that the Senate, by reason of its constitutional power to give the President its advice as well as its consent, has the right to ratify a treaty with reservations or modifications.[1] And it has repeatedly exercised this right, a recent example being its action on the protocol for the Permanent Court of International Justice, commonly known as the World Court.[2] When the Senate modifies a treaty it goes back to the President who may then, if he chooses, reopen negotiations to have the Senate changes inserted. But if he does not choose to do this, or fails in the reopened negotiations, the treaty is invalid.

Requesting the President to negotiate a treaty.

Not only may the Senate amend a treaty, or add reservations, but it may by resolution, either of itself or jointly with the House of Representatives, request the President to open negotiations on any matter with a foreign power. It has occasionally done so, but the President is under no legal obligation to comply. The initiative in treaties is exclusively within his discretion. On the other hand the President may recall a treaty from the Senate after he has submitted it and may decline to exchange the final ratifications with the other country even after the Senate has voted approval. This, of course, he would not do unless conditions had changed in the interval.

A treaty, when duly approved and ratified, becomes, like the

[1] Haver *v.* Yaker, 9 Wallace, 32 (1870).

[2] One of these reservations being unacceptable to the other countries which had adhered to the protocol, an alternative reservation was prepared and submitted to the Senate which finally declined to accept it.

Legal status of a treaty.

constitution, the supreme law of the land, and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. No state may make a treaty of any kind, nor may it enforce any law which contravenes the terms of a treaty made by the national government. The national government, moreover, may conclude treaties covering matters on which Congress would have no right to pass laws. The right of foreign citizens to acquire and hold property in the United States, for example, is a proper subject of a treaty provision, although the regulation of landholding in any state does not come within the legislative jurisdiction of Congress.[1]

Abrogating a treaty.

A treaty may be "denounced," or arbitrarily terminated by one of the parties, without the consent of the other; but the morality of such action is questionable. A treaty may also be abrogated by mutual consent or by the making of a new treaty. Moreover a treaty may be superseded in the United States by any act of Congress which is inconsistent with the terms of the treaty. Acts of Congress and treaties stand upon the same level. When a federal statute and a treaty are in conflict the later in point of time prevails. A treaty may thus be used to modify an act of Congress and certain provisions of the national prohibition act (Volstead law), some years ago, were modified by a treaty with Great Britain. A treaty may be in conflict with some provision in a state constitution; if so the treaty prevails. But a treaty must not be in conflict with any provision of the national constitution, for if so, the treaty is void. No treaty, for example, could give a foreign country the right to take property of American citizens without just compensation.

Relation of the House to treaties.

Strictly speaking, the House of Representatives has nothing to do with treaties, but occasions may arise in which action on its part is virtually necessary in order to make a treaty effective. No money can be appropriated for any purpose, no laws passed, no changes made in the tariff, for example, without action on the part of the House. Treaties sometimes provide that money will be paid, or that reciprocity in tariff matters will be granted by the United States. The treaty with Russia, whereby the United States purchased Alaska in 1867, is an example; likewise the treaty with

[1] Congress, for example, could not, by passing a law, give the Japanese the right to own land in California. But the President and the Senate, by making a treaty with Japan, could grant this privilege in all the states.

Spain in 1898, which provided for the payment of twenty million dollars in connection with the transfer of the Philippine Islands.

But what if the House of Representatives had refused to join in appropriating the money stipulated by the terms of these treaties? That is a very old constitutional question, for it was raised and discussed in connection with the Louisiana Purchase of 1803, and it has been debated several times since; but it is still an unanswered question because the House has, thus far, never failed to do its part. To be sure, it has occasionally asserted its right to refuse, but it has never failed to vote the money. Legal opinion inclines to the view that while the refusal of the House to do its part in carrying out the provisions of a treaty might place the nation in an awkward predicament, the House would be quite within its constitutional rights if it ever decides to take that stand.

The treaty-making power and secret diplomacy.

It is often said that treaty-making arrangements such as exist in the United States would be intolerable in any European land. In England treaties are made by the secretary of state for foreign affairs without the necessity of submitting them to anybody outside the cabinet. In various countries of continental Europe certain treaties must be submitted to the legislative chambers, but not the ones which require secrecy. Military alliances and other far-reaching international agreements have often been made by European chief executives alone. The people have not been consulted as a rule; their direct representatives have rarely been asked for advice; in some cases they have not even been informed of military alliances already made. Bismarck, the iron chancellor of the German Empire, once spoke of public opinion as "the great enemy of efficient diplomacy." It was an absurdity, he thought, to let the general public know and interfere with the games that were being played on the diplomatic chessboard. If that be true, American diplomacy can never be very efficient, for more than a hundred persons have a share in it—the President, his cabinet, and ninety-six senators. It might seem as though so many cooks would be sure to spoil the broth, but the situation at least requires American diplomacy to be aboveboard and permits it to be honest.

Value of the American safeguard.

Secret diplomacy is not yet a thing of the past in Europe, despite the provision that all treaties must be registered with the League of Nations; but it ought to be, for there is little to be said in defense of it. The men of 1787 were wise when they set up a barrier against secret treaties of any kind, so far as America is concerned. At

times, no doubt, the requirement that treaties must go before the Senate has been a handicap. It has occasionally prevented the President from making a good bargain. It has compelled him to enter negotiations with one hand tied behind his back. Secretaries of state have fumed and fussed about the Senate's interference—as John Hay did when he complained that a treaty going into the Senate was like a bull going into the arena; it could never hope to come out alive and unmutilated. But the necessity of senatorial concurrence has been on the whole salutary. It has held impulsive Presidents in bounds. It has kept the nation on its course without entangling alliances. Since the constitution went into force the United States has never concluded a single secret treaty of any sort. No other great country can say the same.

Should the two-thirds provision be modified?

Nevertheless it may be questioned whether the requirement of a two-thirds vote in the Senate has not outlived its usefulness. Would it not be better to substitute a requirement that treaties be ratified *by a majority vote in both houses?* This would seem to provide an adequate safeguard, and it would have logic on its side, for a treaty has the force of a federal statute so far as the application of its provisions by the courts is concerned. Moreover, as has just been pointed out, there are some cases in which the provisions of a treaty cannot be carried into operation without action on the part of both houses.[1]

Impeachments

3. The power to try impeachments.

The Senate, as the constitution declares, has "the sole power to try all impeachments." Several important questions arise with respect to the scope and incidents of this impeachment power. How did this process of impeachment originate? Why did the framers of the constitution establish it in the United States? Who may be impeached, for what offenses, and what are the penalties in the event of conviction? Does the procedure in impeachments differ from that of an ordinary trial by jury? Can a pardon be granted after conviction? And to what extent has the impeaching power been used in the national government of this country?

Its origin in England.

The impeachment is of English origin. It dates back into mediaeval times, and for many centuries before the development of cabinet responsibility it afforded the only means whereby an adviser of the crown could be brought to account by the House of

[1] *Above*, pp. 284–285.

Commons. The Commons preferred the charges; the House of Lords heard the evidence and gave its decision. Many high executive officials who used their power oppressively were brought up with a sharp turn in this way. An impeachment, however, should be clearly distinguished from a "bill of attainder," which provided a way of condemning men to death by ordinary legislative process, without formulating definite charges or giving them any sort of trial. Bills of attainder are prohibited by the Constitution of the United States, and they have long since become obsolete in England.

Why adopted in America.

The English impeachment procedure, on the other hand, commended itself to the pioneers of the American political system as a necessary safeguard against the exercise of arbitrary power. They found difficulty, however, in determining just how the English impeachment system could best be adapted to the needs of a purely representative government.

> "A well-constituted court for the trial of impeachments," declared Alexander Hamilton, "is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. . . . In such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt." [1]

For this reason it was suggested that the impeachment power should be given to the Supreme Court, or to the Supreme Court and the Senate sitting together. But there were practical objections to both these alternatives. Would it be wise, for example, to have an impeachment of the President tried by judges whom he had himself appointed? So the convention decided to follow the traditional English practice of allowing the lower House to prefer the charges and the upper House to hear them. Its members were well aware that this was by no means an ideal arrangement. But if mankind, as one of the delegates sagaciously remarked, "were to agree upon no institution of government until every part of it

[1] *The Federalist*, No. 65.

had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert."

Who may be impeached?

Who may be impeached? Only the "President, Vice President, and all civil officers of the United States." The list of civil officers includes ambassadors, members of the cabinet, judges of all federal courts, even postmasters; but it does not include members of either branch of Congress, nor, of course, officials of the several states. Members of the Senate and the House may be expelled by a two-thirds vote of their respective chambers, but not impeached at Washington. They are not civil officers of the United States.[1] This was decided by the Senate at an early date in the Blount Case, which is discussed a few pages later. Senators and representatives in Congress are responsible to their own states and to the people of these states.

Is resignation a bar?

May a civil officer of the United States be impeached for an offense committed while holding office, even though he is no longer in office when the impeachment proceedings begin? That was one of the points raised in the Belknap Case (1876). Belknap was secretary of war during Grant's second administration. He was charged with having received money from the profits of trade at one of the Indian posts under his jurisdiction. When the charge was made public, impeachment proceedings were begun in the House and Belknap tried to sidestep them by resigning. President Grant accepted the resignation but the Senate voted by a majority to proceed with the impeachment, which it did. For lack of the requisite two-thirds majority, however, Belknap was not convicted. So the question cannot be looked upon as having been decisively settled.[2]

For what offenses?

The constitution sets forth the offenses for which a civil officer may be impeached; but it does not do this with absolute clearness. The grounds for impeachment, as therein stated, are "treason, bribery, or other high crimes and misdemeanors." The first two words of this clause are definite enough, but the remaining part of it is ambiguous, and this ambiguity has given rise to some dif-

[1] Notice, in corroboration of this, the wording of another clause in the constitution (Article I, Section 6), which provides that "no senator or representative shall, during the time for which he was elected, be appointed to *any civil office*."

[2] For an argument that such officers are not liable to impeachment, see Joseph Story, *Commentaries on the Constitution of the United States* (5th edition, 2 vols., Boston, 1891), Sec. 801.

ference of opinion, for a misdemeanor in the eyes of the law is a relatively trivial offense. In general, however, it is now understood that civil officials are not to be impeached except for grave misconduct, dishonesty, or malfeasance in office. General incompetence, or bad judgment, or the abuse of an official's discretion are not grounds for impeachment.

The penalties.

When an officer is convicted by the Senate he cannot be punished to any further extent than removal from office and disqualification from ever holding a federal position again. He cannot be put to death, imprisoned, or fined. But conviction upon impeachment does not prevent additional proceedings against a civil officer in the ordinary courts of the land if he has committed an indictable offense. Even a cabinet officer may be tried and convicted in the regular courts for offenses committed while in office. This has happened within recent years. A two-thirds vote of the Senate is necessary in all cases for conviction on impeachment and no pardon from any human source is possible in the case of one so convicted. The constitution makes this single exception to the President's pardoning power—for the obvious reason that it would not do much good to impeach a presidential adviser if the President retained his prerogative of pardon in such cases.

The procedure.

The procedure in impeachments may be briefly outlined. First, the accusation is made by some member of the House of Representatives from the floor of that body. A committee of the House is then appointed to investigate the charges. If it finds that an impeachment should be proceeded with, the committee so reports to the House and the latter may vote to accept this recommendation. In this case articles of impeachment are prepared and transmitted to the Senate. The Senate has no discretion as to whether it will accept these articles or not. It merely sets a date for the trial and furnishes the accused official with a copy of the charges preferred against him. In hearing an impeachment the Senate sits as a court, the senators being "placed on oath or affirmation," before the proceedings begin.

Who presides?

The Vice President of the United States presides over the Senate except when the impeachment is directed against the President, in which case the Chief Justice of the United States presides. This provision is made for a self-evident reason, namely, that the Vice President would not be an appropriate chairman when the outcome of the trial might determine his own promotion to the

presidency. In impeachments the usual rules of evidence are observed; the accused official is allowed to be heard in his own defense; he may summon witnesses, and may have his own counsel. The proceedings are public until the senators are ready to vote upon a verdict. Then they go behind closed doors and deliberate in secret like a jury.

Famous impeachments.

There have been ten federal impeachments in all, but only three of them have come within the last fifty years. The most notable were those of William Blount, senator from Tennessee (1797), Andrew Johnson, President of the United States (1868), and William Belknap, secretary of war (1876), all of whom were acquitted.[1] Senator Blount was charged with having a part in a conspiracy to stir up trouble in Florida and Louisiana, which at that time belonged to Spain. The Senate, after receiving the charges, expelled him from its membership, but refused to convict him on impeachment, holding that he was not a "civil officer of the United States." Secretary Belknap, as has already been said, was charged with the acceptance of money from a trader whom he had appointed to an Indian post.

Blount.

Belknap.

Johnson.

Finally, and most conspicuous of all, was the Johnson Case. Andrew Johnson of Tennessee was not elected President. He succeeded to the office on Lincoln's death and found a hostile Congress in readiness for him. More particularly he fell out with it over the procedure to be followed in reconstructing the Southern states, and the two ends of Pennsylvania Avenue began hurtling brickbats at each other. The charges against President Johnson were eleven in all, most of them having to do with "discourtesy to Congress" and with violations of the tenure of office act which Congress had passed over the President's veto in 1867. This act forbade the dismissal of certain public officers without the Senate's approval. It was undoubtedly an unconstitutional statute and was later repealed. President Johnson was justified in refusing to be controlled by its provisions, but he was not politically discreet in letting himself be drawn into a knockdown fight with

[1] The first conviction was that of John Pickering, a federal district judge, who was charged in 1803 with "drunkenness and profanity on the bench." He was probably insane. The second case was that of another district judge, West H. Humphreys, who was charged in 1862 with having "engaged in rebellion against the United States," he having thrown in his lot with the Confederacy without resigning his judgeship. The third case was that of Judge Archbold of the short-lived Commerce Court, charged in 1913 with having accepted "presents" from persons who had cases before him.

Congress when he might have avoided it by a reasonable admixture of conciliation and adroitness.

His acquittal.

So Congress made up its mind to get rid of the President, and his impeachment was conducted in an atmosphere of intense bitterness. The whole country ranged itself into two camps while the trial dragged on. At its conclusion the Senate voted thirty-five to nineteen for conviction, which was only one vote short of the required two thirds. It was a close call. In the autumn after Johnson's acquittal the next presidential election took place, and the subsequent inauguration of President Grant put an end to the strained relations which had existed between the executive and legislative branches of the government.

A last resort.

An impeachment is at best a cumbrous and costly proceeding. It is not a method to be used if there is any simpler way of securing an officer's dismissal. But in the case of a President, or of federal judges with a life tenure, or of cabinet members whom the President may decline to dismiss, it is the only way of forcing anyone immediately out of office. Threats of impeachments are made from time to time when members of the cabinet or other high officials become unpopular with congressmen, but most of these are mere political vaporings. Impeachment is a procedure that should never be used except as a last resort.

The Senate's Share in Lawmaking

A coequal branch of Congress.

In addition to its three special prerogatives as above enumerated, the Senate has a general power which is more important than all of these combined. It is not merely an advisory council and a court of impeachment, but a legislative body as well. It is a coördinate, not a subordinate branch of the American Congress and divides with the House of Representatives the function of making the national laws. Aside from one relatively unimportant exception its legislative authority is exactly coequal with that of the House. This exception relates to measures for raising revenue, all of which, by the terms of the constitution, must "originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

The Senate and revenue bills.

This bestowing of an exclusive privilege upon the House in the matter of revenue bills was suggested by an old parliamentary rule in England, and the larger states demanded in 1787 that it be made a constitutional rule in the United States. Otherwise, they

feared, the smaller states, through their control in the Senate, would promote measures of taxation placing most of the burdens on the larger commonwealths. But in practice the limitation on the Senate's right to "originate" revenue bills has proved to be of very little importance, for the Senate can virtually initiate new revenue proposals under the guise of amendments.[1] Some years ago, for example, the House originated and sent to the Senate a tariff bill—and a tariff bill is a revenue measure if anything is. On receiving it the Senate struck out everything in the bill except the enacting clause.[2] Then it inserted a new tariff of its own and transmitted the measure back to the House "as amended." The House grumbled for a while over this evasion of its own special privilege, but in the end accepted the tariff which the Senate had virtually originated. On another occasion when the House tariff came back from the Senate there were no fewer than 847 amendments clinging to it.[3] So the Senate has originated revenue measures in fact, if not in form. It has found a way of doing what the constitution did not intend it to do.

Appropriation bills.

On the other hand the constitution gives the House no exclusive power to originate expenditure bills, or appropriation bills as they are called. No constitutional prohibition prevents the Senate from originating appropriation bills, including even a national budget if it chooses to do so. But the House at an early date assumed the exclusive right to originate such bills and this power it guards with great jealousy. The Senate occasionally ventures to originate a measure which incidentally carries an appropriation of money for a single purpose; but the annual budget, and all general appropriation measures are first submitted in the House.

Legislative powers of the Senate and the House are substantially coordinate.

In all other matters the powers of the two chambers, both by the constitution and by usage, are equal in scope. No bill can become a law without the Senate's approval. At various times and on various matters one chamber or the other may have the greater amount of legislative influence because of its better organization or stronger hold upon public opinion. It is sometimes asserted that the Senate, taking its legislative history as a whole,

[1] By a "revenue bill" is meant a measure primarily designed to raise revenue, not one which aims principally at some other purpose and incidentally brings in revenue.

[2] This is the introductory clause which stands at the head of every measure: "Be it enacted by the Senate and House of Representatives of the United States in Congress assembled:"

[3] Henry Cabot Lodge, *The Senate of the United States* (New York, 1921), p. 9.

has originated more important legislation than the House, and this statement is probably true. Nor is it surprising, for the senators are for the most part men of greater experience in lawmaking than are their colleagues of the lower House.

Senate investigations.

Attention should be drawn to a legislative function which the Senate has developed to rather large proportions in recent years, namely, that of undertaking special investigations into matters of all sorts. This is called a legislative function of the Senate because in theory the various investigations are undertaken in order to secure data that will be of service to the Senate in the framing of future legislation. If it is urged that a law be passed to crush the evils of stock-market speculation, for example, the senators desire to discover at first hand what these evils are and why they exist. In a strict sense the Senate has no right to conduct any investigation save insofar as it may seem necessary to determine whether some legislation is desirable, and if so, what legislation. This, however, is a very ample basis for any investigation that the senators may desire to start, and they have started a good many during the last dozen years.

How conducted.

The usual plan is to pass a resolution ordering an investigation of oil leases on government lands, or telephone companies, or holding corporations, or the expenditure of money in elections, or some other matter that seems to call for remedial legislation. The resolution also designates a committee of senators to conduct the inquiry.[1] The committee may sit in Washington, or it may go about the country hearing testimony, "on a fishing trip," as it is called. These special committees have power to summon witnesses, compel the production of papers, take evidence under oath, and in general to exercise the probing authority of a court. To say that they are merely seeking data as a basis for legislation is to use the words with Pickwickian versatility. What they are usually seeking is ammunition that can be used in the next election campaign. The power of investigation, when used by a legislative committee in this way, is susceptible of serious oppression and abuse.

If the Senate and the House fail to agree on any measure, one or the other must give way, or a compromise must be arranged

[1] On this general question see E. J. Eberling, *Congressional Investigations* (New York, 1928), and M. E. Dimock, *Congressional Investigating Committees* (Baltimore, 1929).

Disagreements between the two chambers—how settled.

by both giving way in part. This is effected by means of a conference committee, representing both chambers, and usually made up of three members from each.[1] In these compromises the Senate has a reputation for getting the better of the bargain. And this is not surprising for the Senate is usually represented on conference committees by stronger personalities, by men of greater skill in bargaining. As a rule, moreover, it gives its conferees a firmer degree of support. Something depends, however, upon the reaction which comes to Congress from the country while the measure is in conference. This reaction may be strongly in favor of the House attitude, in which case the senators, with their ears to the ground, are likely to recede.

The senatorial pride.

The older senators, who guide the upper chamber in its work, are men who have acquired a nation-wide reputation. Naturally they regard themselves as experts in the science of statesmanship and are inclined to look upon members of the lower House as mere fledglings in the art of lawmaking. Even upon the President, as Woodrow Wilson once remarked, the veteran members of the Senate look with "unmistakable condescension." But if this is the case, it is not because the constitution intended senators to have more prestige than members of the House but rather because the Senate is a more compact body, better organized, with a longer term of membership, and perhaps less amenable to the fluctuations of public opinion. "Obedient to the law of political gravitation," as one writer has remarked, "it draws new particles of power whenever opportunity affords." At any rate the Senate of the United States continues to hold first place among second chambers in the great legislatures of the world.

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CHAPTER XVII

THE HOUSE OF REPRESENTATIVES: ITS ORGANIZATION

Liberty, to be enjoyed, must be limited by law, for where law ends tyranny begins, and the tyranny is the same, be it tyranny of a monarch, or of a multitude,—nay, the tyranny of the multitude may be the greater, since it is multiplied tyranny.—*Edmund Burke.*

The "popular branch" of government.

The House of Representatives was intended to be a reformed and popularized House of Commons, in other words to serve as the direct reflector of popular opinion in the nation's government. At the outset it was the only branch of the national government that drew its mandate directly from the people, the President and the senators being chosen by indirect election. Hence the House of Representatives was designated as the "popular branch" of Congress. But this difference has now been swept away. Both the President and the senators are now chosen quite as directly, although not at such frequent intervals, as are the members of the House.

The early distrust of it.

The framers of the constitution took it for granted that any body of directly elected representatives would be impulsive and temperamental. Yet the establishment of a popular chamber was regarded by everyone as a practical necessity.[1] To create a federal government with no branch of it directly responsible to the voters was out of the question. In all the colonies popular assemblies had grown up, and all the states in 1787 had provided for at least one such body in their new legislatures. A constitution without provision for one popularly elected chamber would never have had a chance of being ratified. In view of the bitter protests which had been raised against taxation without representation in Revolutionary days, moreover, the claim of the people to direct control over the "taxing power" was one which could not well be denied.

The constitution, accordingly, provides that "the House of

[1] James Madison and James Wilson, the most persuasive pair of delegates in the convention, argued convincingly that despite the dangers involved in popular representation no plan of free government could hope to endure unless one branch of the legislature was made directly accountable to the people.

Representatives shall be composed of members chosen every second year *by the people* of the several states." In accordance with the compromises which had been agreed upon, it was further stipulated, first, that the several states should be represented according to their respective populations, and second, that in estimating this population all persons other than free white persons were to be counted on a three-fifths basis; in other words, that negro slaves were to be counted at only sixty per cent of their numerical strength. The first House of Representatives was to have sixty-five members, distributed among the states in a way which was assumed to be roughly proportional, but a census was to be taken forthwith and a redistribution on a more accurate basis arranged on these figures. Further provision was made that a similar redistricting should take place after each decennial census, but that the House should never contain more than one member for every thirty thousand population. No state, nevertheless, was ever to be without at least one representative. Within these limits the size of the House was left to the discretion of Congress itself.

The basis of representation in the House.

As to who should have the right to vote at congressional elections, the framers of the constitution did not venture to decide. There were, at the time, wide differences among the thirteen states in the matter of suffrage requirements, and it was not deemed advisable to impose upon any of them a general provision which might be out of accord with their own practice. Hence the convention neatly evaded the difficult question by leaving it to be settled by each state for itself. This, to be sure, was hardly a logical thing to do, for the suffrage is one of the most fundamental things in free government; yet it was probably the best way out of an embarrassing situation. The country was not ready for manhood suffrage in 1787. On the other hand it would have been unwise to insert in the constitution a general property qualification such as existed in a number of the states.

Who vote at congressional elections?

Each state, accordingly, was given the right to determine who should vote at congressional elections, but subject to the restriction that the requirements must be the same as those for voting at elections to "the most numerous branch" of its own state legislature. Whoever has the right to vote for members of the state assembly must therefore be given the right to vote for members of the national House of Representatives.[1] Hence there is no

Each state decides for itself.

[1] See *above*, pp. 106–107.

national suffrage in the United States, as in other countries. National officers do not register the voters in any state, or print the ballots, or count them. State officials do it all. Representatives in Congress are elected at polling places which the states provide, pay for, and supervise. The fifteenth and nineteenth amendments to the federal constitution do not, in a literal sense, confer the suffrage on anybody; they merely provide that it must not be denied on certain grounds.

Other matters relating to Congress on which the constitution is silent.

The framers of the constitution not only evaded the problem of a uniform suffrage but they reached no decision on several other questions relating to the organization of the House. They set a maximum limit (one member for every 30,000 population), but it proved too high. Almost from the outset the problem has been to keep the House from growing too large. Moreover, the makers of the constitution did not say whether the election in each state should be by congressional districts or by the voters of the state at large. They did not even say that elections should be by ballot, or that they should be held in all the states on the same day. They left the "time, place, and manner of holding elections" to be decided by the individual states, each in its own way; but added a saving provision that "Congress may at any time make or alter such regulations, except as to the places of choosing senators." [1]

Growth of the House in size.

The first House of Representatives, which met in 1789, contained sixty-five members, or one representative for every 30,000 people. When the constitution was before the states for ratification there was complaint that the quota of representation had been set too high, and Madison devoted one of his *Federalist* letters to an argument that it was low enough. In the eighteenth century it seemed absurd that any congressman should expect to represent as many as 30,000 people. With then-existing facilities for getting around a district and making acquaintances he could hardly hope to know that number. Today the quota of representation is about nine times as large. At any rate the House began to grow like Jonah's gourd. Within two years after its establishment it had 103 members; then it expanded to 213 in 1820. This rapidity of growth was not kept up, of course, although some increase in membership took place after every census from 1790 to 1910.

[1] Article II, Section 4. The reason for the exception in the last clause is that the senators were to be chosen by the state legislatures at the state capitals and it was not deemed wise that Congress should have power to compel the legislatures to meet for this purpose at some other place.

Today it stands at 435, where it was placed after the last-named date. No reapportionment was made after the census of 1920 and no change in size after the census of 1930, there being a general belief that the House is already too large for the efficient handling of business.

The apportionment of seats.

How are these seats apportioned among the states? The constitution provides that they shall be distributed among the states upon the basis of their respective populations as shown by the last decennial census.[1] Every ten years, therefore, it is the duty of Congress to make a reapportionment of seats. The first step in this connection is to determine whether the size of the House shall be increased. Then, by dividing the number of seats into the total population of the country, a "quota of representation" is obtained. With 435 seats and a population of 122,000,000, you need only juggle a slide-rule to find that this quota, at the present time, is approximately 282,000. Hence a state with three million inhabitants would get ten seats in the House. At first glance all this would seem to be an easy problem in simple arithmetic.

A problem in arithmetic.

But it is not quite so easy as it looks, and for two reasons. In the first place, the constitution requires that every state shall have at least one representative, even though its population be less than the quota of representation.[2] Hence one member is assigned to each of the forty-eight states, and the remainder (387) is then left to be assigned to the states in proportion to their respective populations. But here arises the second difficulty. When the population of any state is divided by the electoral quotient (or quota of representation) there is always a remainder left, and the sum total of these remainders, in the country as a whole, represents a number of electoral quotas. In other words there are some seats left over. From 1850 to 1900 the plan was to distribute these remaining seats, as far as they would go, among the states having the largest surplus fractions of the electoral quotient. One additional seat was given to the state with the largest excess fraction, and so on down the list until there were no more seats to distribute. This arrangement was not altogether

[1] The original constitution stipulated that persons other than "free white persons" should be counted on a three-fifths basis, but this provision was eliminated by the fourteenth amendment.

[2] There are four states which have populations below the quota, namely, Delaware, Arizona, Nevada, and Wyoming.

satisfactory, however, for it sometimes happened that there were not enough seats to give one to each state having a fraction amounting to more than half the electoral quotient. In 1910, therefore, Congress adopted what is known as the method of major fractions and this method was also used in the reapportionment of 1930.[1] Under this plan the electoral quotient or quota of representation is fixed at such a figure that each state with more than half of it is given an additional seat and there are exactly enough seats to go around.[2]

Why the size of the House is hard to reduce.

With a membership of 435 the House is too large. Business is impeded by its bulk. There should be a reduction to 400 or less. But such a reduction, as a matter of practical politics, is difficult to bring about. No state likes to have its allotment of congressmen cut down. The congressmen from states which are likely to suffer can be counted upon to combine in opposition to any such proposal. The best that can be hoped for, then, is to keep the House from growing larger. Even at that some states lose seats after each decennial census, for the rapidly-growing regions of the country become entitled to more, which means that other sections must be content with less. After the census of 1920 it became evident that an increase in the size of the House could not be avoided except by reducing the representation from several states. These states put up a stiff fight and succeeded in preventing any reapportionment at all, thus forcing Congress into violation of an express constitutional mandate. In connection with the census of 1930 a permanent and continuing law was passed. It provides that if Congress, after any future decennial census, should fail to pass a reapportionment act, then the method of major fractions shall be worked out by the census bureau and applied.

In discussions of this matter we are often reminded that the

[1] There was no reapportionment after the census of 1920.

[2] The *Method of Major Fractions* is applied in this way: The population of the several states is divided successively by $1\frac{1}{2}$, $2\frac{1}{2}$, $3\frac{1}{2}$, etc. These numbers or quotients are then set down in the form of a series, the highest number first, the next highest second, the next highest third, and so on, down to the lower numbers. One seat is first allotted to each of the forty-eight states. Then the state having the number which is first or highest on the list is allotted the forty-ninth congressman; the next highest is given the fiftieth; the next the fifty-first, and so on, until the seats are exhausted. By using this method each state receives one representative for each full quota and an additional one for a major fraction of the quota.

An alternative plan, known as the *Method of Equal Proportions* has been proposed. Its only difference is that the population of the several states is divided successively by $\sqrt{1 \times 2}$, $\sqrt{2 \times 3}$, $\sqrt{3 \times 4}$, and so on instead of by $1\frac{1}{2}$, $2\frac{1}{2}$, $3\frac{1}{2}$, etc.

American House of Representatives is smaller than popular chambers in other countries. The House of Commons has 615 members and the French Chamber of Deputies 626. But both these bodies operate under a system of executive leadership which offsets the handicap of a large membership. They have ministers with seats on the floor who lead the debates and put the business through. The House of Representatives has no such executive leadership. If it were organized like these European chambers it could double its size and still work more expeditiously than it does now; but it is differently organized and is likely to remain so.

Comparison of its size with foreign chambers.

Congress allots representatives to states, not to districts. A state is given two, three, twenty-five, forty-two seats—whatever the allotment may turn out to be. Then the state legislature (when the state has more than one representative) makes the division into congressional districts. This it does under a federal law which requires that each congressional district must be made up of contiguous territory and that all the districts shall be approximately equal in population. Prior to the passage of this statute, in 1842, many of the states elected their congressmen at large. This plan was deemed objectionable because it gave the majority party all the congressmen from the state, and the minority none at all. Under the district system, in all but the overwhelmingly partisan states, there are likely to be a few congressmen from the minority party. For even though a state is regularly carried as a whole by one political party there are likely to be certain sections of it which have a different party affiliation. The large cities, for example, often have a different political complexion from the rural districts.

The district system.

This work of redistricting a state, when it gains or loses congressmen, is performed by the state legislature, but the task is assigned in the first instance to a committee of its own members appointed for this purpose. The recommendations of this committee then come before the legislature and are acted upon. So far as practicable an effort is made to respect local boundaries by placing an entire city or town in one congressional district, but at times it becomes necessary to place one part of a municipality in one congressional district while the remaining part goes into another. In large cities it is also thought desirable to respect ward boundaries, and in rural areas the aim is to put whole counties into the same district wherever it is feasible to do so. To accom-

Principles on which districts are based.

plish all these things and yet have districts approximately equal in population is sometimes a difficult problem. It demands careful study and absolute fairness.

The practice of "gerrymandering."

Too often, unhappily, it gets neither. State legislatures are partisan bodies, and so are their committees. Because of their intense partisanship the attempt is often made to lay out the districts in such way that the interests of the dominant political party will be served. This practice of "gerrymandering" is more than a century old; it took its name from Governor Elbridge Gerry of Massachusetts, who sanctioned one of the first flagrant cases of partisan district-making in that state.[1] Thereby he set a fashion which persisted for many years, and has not yet entirely disappeared. By adding one county and taking off another, by shaping the district in some unnatural way, so that in configuration its nearest resemblance may be to a shoestring or a lizard or a starfish, it is quite possible to make the area yield a comfortable majority for the candidate of the right political party. The hostile votes, on the other hand, can be "hived" or massed into a few districts which are likely to go to the opposition party in any event.[2] In other words the art of gerrymandering is to spread the majorities of your own party over as many districts as possible and concentrate the strength of your opponents into as few districts as you can. The gerrymander has been a pernicious factor in American politics and popular sentiment has been slowly developing against it. Today it usually proves a boomerang to the party that attempts it.

Surplus members at large.

Sometimes a state legislature does not get its redistricting finished before a congressional election comes. In that case, the old districts choose one congressman each, and if there are additional congressmen to be chosen, they are elected at large. But

[1] Mr. John Fiske has given the following account of the incident: "In 1812, when Elbridge Gerry was governor of Massachusetts, the Republican legislature redistributed the districts in such wise that the shapes of the towns forming a single district in Essex County gave to the district a somewhat dragon-like contour. This was indicated upon a map of Massachusetts which Benjamin Russell, an ardent Federalist and editor of the 'Centinel,' hung up over his desk in his office. The celebrated painter, Gilbert Stuart, coming into the office one day and observing the uncouth figure, added with his pencil a head, wings, and claws, and exclaimed, 'That will do for a salamander!' 'Better say a Gerrymander!' growled the editor; and the outlandish name, thus duly coined, soon came into general currency."

[2] One district in Illinois was long known as the "saddlebag" congressional district because it comprised two groups of counties at opposite ends of the state with a thin strip connecting them. On the practice in general see E. C. Griffith, *The Rise and Development of the Gerrymander* (Chicago, 1907).

if the number of congressmen allotted to the state has been reduced, all of them are elected at large, the old districts being disregarded until the new ones have been established by law.

Nominations.

Candidates for election to the House are nominated as the laws of each state may provide. Some states still retain the plan of nomination by conventions of party delegates but the majority of them have now provided for direct primaries.[1] The change, it was thought, would bring forth candidates of a better type, but it has apparently resulted in no perceptible improvement. The quality of the House membership has not visibly changed since the voters took into their own hands the function of nominating candidates. Primary campaigns are expensive and a great advantage goes, under the direct primary system, to the candidate who commands an ample campaign fund.

Elections.

Congressional elections are held throughout the country on the same day, namely, on the Tuesday following the first Monday of November in every alternate year.[2] The voting must be by secret ballot, but this does not preclude the use of voting machines. Candidates for other offices, state or national, are usually chosen at the same election and on the same ballot, the so-called Australian type of ballot being the one which is almost everywhere used. Many of the states make provision for absent voting. By this arrangement those voters who are absent from their homes on election day are allowed to vote by mail or in some cases to mark their ballots before leaving home.[3]

Contested elections and recounts.

In England when any dispute arises in connection with the voting or the validity of an election the controversy is settled by the courts, like any other legal dispute. But in the United States the House of Representatives is the deciding authority, having the sole power to declare which of the claimants is to be seated. The procedure in such cases is for the defeated candidate to serve notice upon the one who has been reported as elected, setting forth the grounds of his protest. To this the latter makes formal reply, and the papers are transmitted to the clerk of the House. The

[1] For an explanation see Chapter XXXIV.

[2] A few states which could not accommodate themselves to this arrangement without amending their state constitutions were exempted from the general rule. Maine still holds her congressional elections in September and thus attracts a good deal of attention as affording an indication of what is likely to happen in the rest of the country at the subsequent November balloting. Hence the saying "As Maine goes, so goes the Union."

[3] See *above*, p. 119.

matter is thereupon referred to one of the committees on elections, of which the House maintains three, and this committee hears the evidence in the case. When this is concluded, the committee reports to the House, where its recommendation is almost invariably accepted.

Contested elections are not common in the United States. The general tendency is to accept the results of the balloting as announced when the polls are closed. When the successful candidate's lead is very small, however, a recount of the votes is sometimes asked for and granted under such conditions as the election laws provide.

Qualifications of representatives.

The qualifications of a representative in Congress, as set forth in the constitution, are merely that he shall be a citizen of seven years' standing, at least twenty-five years of age, an inhabitant of the state from which he is elected, and not a holder of any office under the authority of the United States. Even army and navy officers are regarded as coming within the scope of this prohibition as to officeholding. It will be observed that nothing is said about the candidate's being an inhabitant of the *congressional district* from which he seeks election. It is legally quite permissible for a congressional district to elect a non-resident, and on rare occasions a district has done so. But there is a strong prejudice against the outsider who enters the field against "a local man." This public prejudice is usually expressed in the plausible assertion that a local man will "know the needs of the district better." Local pride, moreover, takes offense at the implication that a lack of homegrown material compels the district to go outside its own boundaries for a congressman. An outsider, if he has a wide acquaintance in the district, can sometimes come in and win, but his chances are very slim under even the most favorable conditions.

English and American usage on this point.

This is a matter in which American political traditions differ conspicuously from those of Great Britain. The election of non-residents to the House of Commons is not at all uncommon; on the contrary many of the British political leaders represent districts (or constituencies) in which they have never resided and which some of them rarely visit except on the eve of an election. The first time that Edmund Burke set foot in his constituency of Bristol was when he went there to thank the voters for having elected him. The merit of the British practice is that it encourages

a member of parliament to develop himself into a national figure. A strong man in British politics need never be without a seat in parliament; even if his home constituency goes back on him he can be accommodated elsewhere when the first vacancy occurs. But the ablest statesman in the United States has practically no chance of a seat in Congress if his own district contains a majority of voters who belong to the opposite political party.

Why local candidates are favored in America.

The reasons for American prejudice on this point do no credit to our political ideals. They are too closely related to the matter of spoils and patronage. Members of the House of Representatives are fairly well paid as soft jobs go, hence every district has its crop of men who aspire to be the recipients of a national pay check. These local aspirants are always ready to join in the hue and cry against any "carpet-bagger" who comes in and tries to get himself elected from a district to which he does not belong. Every congressional district, moreover, desires to participate in the annual appropriations for post offices, for the improvement of rivers, harbors, or roads, and for the relief of the unemployed. It wants a congressman who will be successful in getting such favors, and there is a feeling that a local man can do it better than anyone else.

The logical function of a representative.

Now this suggests a query as to the proper function of a representative, whether in Congress, or in a state legislature, or in any other elective body. Is it his duty to act in accordance with the dictates of his own judgment and in obedience to his own conception of the general welfare, regardless of whether this may reflect the opinion of his own particular district? Or is the sole function of a representative to "represent," in other words to discover what his district wants and to be governed accordingly? These are fundamental questions which every representative must face at times. A legislator may be personally opposed to the guarantee of bank deposits, let us say, and may believe that such an arrangement puts a premium on loose banking methods. But if a majority of the voters in his own district are known to be strongly in favor of such a guarantee, how should he vote upon the question of establishing it? Should he stultify his own judgment and convictions, or should he disregard the logic of his own position as a "representative of the people"? Is it conscience or constituents that should determine his vote? Congressmen are often confronted by this dilemma. Students of political philosophy,

too, have wrestled with the question but have reached no agreement of opinion on it.[1]

The dictum of Burke.

It may not be inappropriate to quote in this connection, however, the famous dictum of Edmund Burke in his address to the electors of Bristol when he defended certain unpopular votes which, as their representative, he had given in the House of Commons. "I maintained your interests against your opinions," he declared. "A representative worthy of you ought to be a person of stability. I am to look indeed to your opinions; but to such opinions as you and I must have five years hence. I am not to look to the flash of the day." The American legislator does not talk in that strain. The pinnacle of his ambition is to find out what the people want and to do it quickly. Whether they are wise in wanting it he does not usually stop to inquire.[2] He keeps his ear close to the ground, so close, as Speaker Cannon once said, that he "gets it full of grasshoppers."

Congressional terms are too short.

The brevity of the congressman's term is in part responsible for this. He is chosen for two years only. He does not have time to make a broad record by which he may fairly be judged. His people are apt to be guided, in their estimation of his work, by the way he votes in Congress on the few outstanding measures which happen to come up during his all-too-brief span of service. So he cannot afford to take the chance of antagonizing them on any one measure even though he would be able to satisfy them on a hundred others if his term were long enough. They are also prone to judge him by what he gets, or fails to get, in the way of definite advantages for his own district. He is expected to fetch home a new post office building, or an appropriation for dredging some local harbor, or a mail airport, or something else that proves his alertness at Washington. He must get places on the public payroll for some of his prominent supporters. If he comes back empty-handed he gives his opponents an issue wherewith to encompass his defeat.

In no other country are members of the national legislature chosen for such short terms as in the United States. This brevity

[1] For a further discussion see J. W. Jenks, *Principles of Politics* (New York, 1909), pp. 76–80.

[2] A congressman once told me that it was his custom to put in one pile all the letters and telegrams which came from his district in favor of any important measure. Then, in another pile he put all the telegrams and letters opposing it. When the time came for voting on the measure he merely took a glance at the two piles and went with whichever was the higher.

of service is a handicap in many ways, yet it has some compensatory advantages. It serves to keep the House close to the sentiment of the voters. It compels every member of it to render a biennial accounting and thus imposes on him a real sense of his responsibility. The congressional elections, coming every two years, likewise afford an opportunity to ascertain whether the administration is gaining or losing its hold on the people. Their outcome has an important influence upon the direction of presidential policy despite the fact that the chief executive is beyond the reach of the voters for two years more.

But there are some advantages.

Be it borne in mind, also, that although a member of the House is chosen for only two years, he expects reëlection for a second, or even for a third term. And under normal conditions he gets it. Fewer than one fourth of the members, as a rule, are first-termers. Even these, moreover, have usually had some political experience as members of state legislatures or city councils. It is only on rare occasions that anyone is elected to Congress without having previously served in some other public office. A large fraction of the membership is made up of lawyers, usually more than half. The remainder include persons of every conceivable occupation—physicians, dentists, teachers, journalists, merchants, farmers, locomotive engineers, steel workers, and (last but not least) professional politicans. The average age is about fifty years. A considerable majority of the members are college graduates or graduates of professional schools, although such graduates form only about two per cent of the country's entire population. If being a college graduate is a handicap in practical politics, the figures do not seem to show it.

Personnel of the House.

The House of Representatives holds one session a year, so that there are two sessions between elections. By the terms of the original constitution it was provided that the regular annual session must begin on the first Monday in December unless Congress should choose to appoint a different day, which it never did. Consequently the first session of a new House did not begin until thirteen months after its members had been elected. They were chosen in November, to take office the following March, and then assembled in December. Meanwhile, the members of the old House met in the December immediately following the election and held what came to be known as a "lame duck" session until their terms expired in March. The nickname of this session was

Its sessions: the old plan.

inspired by the fact that it always contained a number of congressmen who had been defeated at the November elections.

An illustration.

Perhaps the situation can be made clearer by an example. In November, 1930, a new House of Representatives was elected to take office on March 4, 1931. But a session of the House, under the terms of the constitution, was called for the first Monday in December, 1930. Newly elected members could not attend this session since their terms of office did not officially begin until the following March. So the old members returned to Washington and legislated for three months. Then, in December, 1931, the members who had been elected thirteen months earlier met for a long session which lasted until the midsummer of 1932.

Objections to the old plan.

Under this arrangement, moreover, the two sessions were always of unequal length. The session which began a month after a congressional election had to be a short one because the terms of members would officially expire in the following March; but the other session could be continued for a whole year if need be.[1] There were obvious disadvantages in this plan and sometimes it was found necessary to call a special session immediately after the inauguration of a new President because there were problems of legislation which could not wait until the next December. This took place, for example, in March, 1933, when President Franklin Roosevelt took office in the throes of a banking crisis. At once he called Congress together for a brief special session to pass emergency banking laws.

The twentieth amendment and the new plan.

In order to correct this situation, to abolish "lame duck" sessions and to make all congressional sessions of potentially the same length, the twentieth amendment was added to the constitution in 1933. It provides that hereafter Congress shall assemble each year on the third of January unless it shall by law appoint a different date. Provision is also made that the terms of senators and representatives shall begin on January 3 and those of the President and the Vice President on January 20. Under this new arrangement the members of the House of Representatives who are elected in November will take office in January and immediately begin their session which can continue for a full year if so

[1] Each new Congress, when it assembles, is designated in all its official acts by a serial number. The one which convened in 1789 was known as the First Congress; the one now in existence (1936) is the Seventy-fourth Congress. This explains the reference in official documents to "Fifty-fourth Congress, first session," or "Sixty-eighth Congress, second session," etc.

desired, and the second session can be of the same length. Lame duck sessions, as well as the alternation of long and short sessions, have thus been eliminated. Likewise the need for special sessions has been reduced to a minimum.

Should congressmen be chosen for longer terms?

The congressional term remains fixed at two years which is rather too short for the best results. Yet if some of the delegates in the constitutional convention of 1787 could have had their way, the congressional term would have been one year only. "Where annual elections end, tyranny begins," was a stock platitude in colonial days. It is quite true that members of the House are frequently reëlected, and that a few of them manage to retain their seats for ten or even twenty years. On the other hand a great many are retired to private life after one or two terms, before they have had a real opportunity to acquire familiarity with national problems. A congressional district is usually made up of several towns or counties, and there is a feeling that no one of these areas ought to hold the prize too long. Similarly there is a prevalent notion that no one person should be permitted to hold the place as a steady job. It ought to be passed around. The idea of rotation is strong among the politicians and they often manage to bring the voters to the same point of view.

Effect of short terms upon congressional leadership.

Nevertheless a few members manage to keep their seats in Congress for so many years that they become, by that very fact, the natural leaders, although they may have no personal qualifications for leadership. Seniority of service determines the chairmanships of important committees and gives to the experienced congressmen a degree of influence which their own abilities do not always warrant. No other practice, it would seem, could more effectually discourage noble ambition or check the growth of accomplished statesmanship. For there are few walks of life in which experience counts for more than in lawmaking. It is both a science and an art. No one comes to Congress with a full knowledge of what he is expected to do. The new member is handicapped by the complexity of the rules and the intricacy of legislative procedure. Likewise, if he be a man of reasonable modesty, he feels disinclined to push himself forward in debate or committee discussions until he has passed the freshman stage. Far from making the House a body in which all members stand on an equal plane, the two-year term and the policy of rotation have tended to center its great powers in the hands of those congressmen who have been

lucky enough to get themselves reëlected three or four times. This designates them as good politicians, perhaps, but not necessarily as capable lawmakers.

The standards of debate in the House.

The debates in the House of Representatives are not of a high order. Nor are they so good as they used to be. This is due in part to the great size and bad acoustics of the chamber in which the sessions are held. Only a leather-lunged orator can make himself heard in every part of it. "It does not always happen that a powerful mind and a powerful voice are combined in the same individual, and often the member with the real message cannot be heard, while the member with nothing to say has no difficulty in filling the chamber with sound." [1] From its galleries the House does not strike the spectator as an impressive body. There is too much inattention, interrupting of speakers, and general clatter. A generation ago the situation was much worse, but the auditorium has now been reduced in size and otherwise improved. The acoustic qualities of the House remain, nevertheless, the worst of any great legislative chamber in the world.

Chamber not well adapted to forensic argument.

It is easier to print speeches than to deliver them.

To some extent, again, the dearth of good speeches is due to the strict limitation upon the time that any speaker may keep the floor, and something may be credited to the custom of allowing a member to have his speech printed without delivering it at all. Why should congressmen make long speeches, or why should others listen to them, when it is so easy to place the speeches in printed form, at the public expense, in the hands of everyone? Members, therefore, ask for "leave to print," or for "leave to extend their remarks in print," and this request, while it requires unanimous consent, is almost always granted. Copies of such speeches, often written for the congressman by his versatile secretary, are printed without ever having been delivered. Then thousands of copies are struck off the government press and sent through the mails, free of postage, to voters in the districts from which the congressmen come. The "franking" privilege, or right to make free use of the mails for all official business, has been grossly abused in this way. Magazine articles and even whole books have sometimes been reprinted and distributed by congressmen at the public expense.

These things contribute to the absence of much genuine oratorical effort in the House, but they do not account for it entirely.

[1] S. W. McCall, *The Business of Congress* (New York, 1911), pp. 108–109.

The pressure of routine business leaves little time for speech-making.

The stupendous mass of routine business which comes before the House day after day is the greatest of all barriers to eloquence. The House is too busy to hear orations or even read them. The mechanical work of putting the grist of bills through their various stages takes almost every moment of its time. The last Congress, at its two sessions, received nearly thirty thousand bills, not to speak of joint resolutions, concurrent resolutions, and reports by the hundreds. Of this total the vast majority never received any serious consideration, even by a committee. Speaker Reed once remarked that the House was a "deliberative but not a deliberate body." He was not intending to be facetious but merely to point out that there is a difference between having the function of deliberation and having the time in which to perform it. If the House held itself to a deliberate consideration of every measure it would never get its work done by sitting twenty-four hours every day in the year. Accordingly it is essential to place strict time-limits on the speeches of those members who have failed to equip themselves with terminal facilities.

So the House of Representatives is not so much a law-making as a law-killing body. There is a large amount of imperative business (voting of appropriations, particularly) which must be given the right of way. And no one can wax oratorical over an item for putting a wing on the post office at Keokuk, or new desks in the Indian school at Big Creek, or fathometers on the vessels of the iceberg patrol, or the other minutiae of a segregated budget. Hence it is only matters of uncommon interest and importance that become the inspiration of a real debate on the floor of the House itself. Visitors go to the gallery, sit there an hour, and usually come away disappointed. They tell you that anyone can hear better speeches, with better attention paid to them, at rotary club luncheons or college football rallies. Emerson once wrote, after a visit to England, that "a kind of pride in bad public speaking is noted in the House of Commons, as if the members were willing to show that they did not live by their tongues." The same might be written of the American House of Representatives today.

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See also the references at the close of Chapter XVIII.

CHAPTER XVIII

THE HOUSE OF REPRESENTATIVES AT WORK

The republican form of government is the highest form of government; but because of this it requires the highest type of human nature, a type nowhere at present existing.—*Herbert Spencer.*

Where the House meets.

Both Houses of Congress meet in the Capitol, a monumental building of marble and sandstone surmounted by a great dome, which is situated at one end of Pennsylvania Avenue, about a mile away from the White House. The hall of the House of Representatives is in the south wing of the Capitol. It is arranged in auditorium fashion, with the seats in a semicircle facing the Speaker's platform. Every member has his own seat, assigned to him by lot at the beginning of the session, and when the House is well filled he occupies it; but when there is a slim attendance he takes any vacant place that suits his fancy. Anyhow the congressmen move around a great deal and carry on their conversations even when a debate is proceeding. It is only when the buzz becomes too audible that the Speaker bangs his ebony gavel on the marble slab in front of him.

How the House organizes.

When a newly elected House assembles, its first duty is to organize. The roll is called to determine the presence of a quorum, and during this first roll call the clerk of the last House presides. The oath of office is then administered to the members. If the validity of any member's claim to a seat is questioned, he does not take the oath until after the House has been organized and the matter decided on its merits. Then the election of a Speaker is in order. The House also chooses its other officers, including the chaplain, sergeant-at-arms, clerk, and doorkeepers. The rules, usually those of the preceding Congress, are provisionally adopted to stand until altered; and the House is then ready to proceed with the business of legislation. At this point the House joins with the Senate in sending a committee to notify the President that both bodies are ready to receive any communication which he may desire to make.

The House of Representatives has full power over its own rules

The House rules.

of procedure. The first House, in 1789, adopted a set of rules based largely upon those which had been used in the Congress of the Confederation. These, again, had been modelled on the rules of the colonial assemblies which harked back to the procedure of the English House of Commons. Each succeeding House since 1789 has readopted these original rules with various changes from time to time. On a few occasions there has been some revision, but many of the provisions which were adopted in 1789 still remain unaltered. The rules of Congress, therefore, are not the work of any one man. They are an evolution, the growth of many centuries of legislative experience. Some of them, as, for example, the provision that a bill shall be given three readings, go back to mediaeval days in English parliamentary history. In 1837 the House adopted a provision, which is still in force, that it should be guided by Thomas Jefferson's famous *Manual* in all matters not covered by its own rules and not inconsistent therewith, but this compendium is now referred to on rare occasions only.[1] The House has developed its own long series of rulings and precedents which cover almost everything that can possibly arise.

Their complicated character.

Much dissatisfaction has been expressed from time to time with the existing rules of the House. Complaint is made that they are needlessly complicated and also that they place too much power in the hands of the House "machine," which is made up of the majority leaders. It is true that the rules and precedents are numerous and complicated, but the work of the House is complex and the rules must adapt themselves to this fact. It is also true that the rules give an advantage to the majority leaders, but is that not in accordance with a sound theory of lawmaking? If we are to have legislation by majorities, is it unreasonable to provide the majority leaders with the means of making this principle effective?

Purposes of the rules.

All rules of legislative procedure have two purposes, and only two: the first is to expedite business, the second is to ensure that business shall not be rushed through without giving the minority an opportunity to express its dissent. Obviously it is difficult to frame rules which will serve both these purposes equally well. Without some limitations on the freedom of debate a small minor-

[1] When Jefferson was Vice President (1797–1801) he prepared this compilation of parliamentary procedure to assist him in his duties as presiding officer of the Senate. It was based largely on English practice.

ity could delay business unduly and thus defeat the purpose of representative government. That is why the House rules, for more than a hundred years, have permitted debates to be brought to a close by "moving the previous question." If such a motion is supported by a majority the question which is being debated must then be voted on by the House without further delay. Likewise the rule which permits the presiding officer to reject any motion which he regards as dilatory owes its origin to the same problem of getting business done without factious delays. The Speaker, by the way, is supposed to know all the rules and the precedents, which of course he does not. And no wonder, for these precedents, as printed more than twenty years ago, occupy about eight thousand pages.[1] So the Speaker has at his right hand an assistant known as the parliamentary clerk or "parliamentarian" who advises him on all complicated points of order.

The Speaker of the House

Origin of his office.

The Speaker, who presides over sessions of the House, is its central figure. His office is both ancient and honorable. In the English House of Commons there have been Speakers for many centuries, and in the early days these presiding officers often stood forth as tribunes of the people, defying the arbitrary mandates of the king. On one occasion, well known to students of English constitutional history, Charles I strode into the House of Commons with a body of soldiers to seize five of its members and demanded that the Speaker point them out to him. But the Speaker with dignified self-assertion replied that he had "neither eyes to see nor tongue to speak save only as this House doth command." The king, finding himself balked in his quest, withdrew in high dudgeon from the chamber. The speakership was naturally transplanted to the colonial assemblies in America, and here also its tradition continued good. Accordingly, there was written into the constitution of the United States a provision that "the House of Representatives shall choose their own Speaker."

But the office of Speaker in America presently came to differ from that which had so long existed in the land of its origin. In the House of Commons the Speaker is, and always has been, a

[1] These precedents are brought together in Asher C. Hinds, *Precedents of the House of Representatives of the United States* (8 vols., Washington, 1907–1908). They are now being brought down to date and republished in a new edition.

Attributes of the Speaker's office in England.

mere presiding officer, with no powers except those which ordinarily go with the chairmanship of any gathering. He has a few honorary functions and privileges, but they are of no political account. He is expected to be absolutely neutral in the discharge of his functions, never giving members of his own party any preference or allowing himself to be drawn into the thick of partisan controversy. When he gives a casting vote he does it by rule, and not according to his own preferences. For example, if the vote is a tie on the question of adjourning a debate, the British Speaker always votes No, irrespective of his own feelings on the question at issue. Hence he is never ousted from the chair when one political party displaces another in control of the House, but holds the office as long as he desires it. He appoints no committees, attends no party caucuses, and is as absolutely non-partisan in all his actions as it is possible for any human being to be. As a result of this neutrality he is never opposed for reëlection in his own district.[1]

In America.

Whether the makers of the constitution, when they gave the House of Representatives the right to choose its own Speaker, had in mind the English model we do not know. They were also familiar with the position held by the presiding officer of the congress under the Articles of Confederation, a position of real authority and influence. At any rate they placed no restrictions upon the office, but left it to develop its own traditions. And it was not very long before the Speaker of the House began to gather power into his own hands. Throughout the nineteenth century he kept gaining and eventually became the most powerful figure in national administration, next to the President himself.[2]

Groundwork of the Speaker's powers.

Why and how did this development of the Speaker's authority take place? Well, to begin with, it arose out of the fact that the constitution provided the House with no official leadership. Apparently the statesmen of 1787 took it for granted that Congress would lead itself, for they prohibited the natural leaders of Congress, namely, the heads of the various executive departments from being members of it. In their desire to establish a system of checks and balances they forced the executive and legislative branches of the government apart, leaving Congress without any provision for official leadership at all.

[1] Michael MacDonagh, *The Speaker of the House* (London, 1914).
[2] M. P. Follett, *The Speaker of the House of Representatives* (New York, 1904).

The need for legislative leadership.

This deprivation was not sorely felt at the outset, for the House was a relatively small body and did not have a great deal to do. But it grew with the increase of national population. With this expansion in size, and with the even more rapid growth of legislative business, the need of a guiding hand became steadily more urgent. No steering could be done, as in England, by members of the cabinet because they were not permitted to sit or even to speak in the House. What more natural, therefore, than the gravitation of leadership into the hands of the Speaker, as the only officer chosen by the House from its own membership? That, at any rate, is what happened. Beginning with Henry Clay the Speaker gradually became the recognized leader of the majority party, and hence of the House as a whole. He became the man on whom the majority depended for getting its measures safely through the maze of rules. So more and more authority gravitated into the Speaker's hands until he became a virtual dictator of legislation. From time to time there were vigorous protests against this steady concentration of powers in the chair, but not until 1910–1911 was the process brought to an end and the authority of the Speaker substantially curtailed.

How the Speaker is chosen.

Before explaining the Speaker's powers, past and present, a word should be said concerning the method whereby he is chosen. In name the choice is always made by the House itself at the beginning of each Congress, that is, every second year. In practice, however, it is always agreed upon, before the House meets, by a caucus composed of members of the majority party. If the same political party controls the House, and the Speaker in the last Congress comes back for another term, it is customary to reëlect him. To be chosen Speaker is a high honor, one which goes only to a man of considerable experience in Congress and of undoubted prominence in his party. If a change takes place in the relative strength of the parties as the result of an election, the next Speaker is likely to be the man who served as floor leader of his party when it was in the minority. In any event it is the majority caucus that makes the choice and the House simply ratifies it.

His specific powers:

At the outset the rules and usages of the House merely authorized the Speaker to preserve order, to sign bills and documents, and to put questions to a vote. But many other prerogatives grew out of these. As the House became larger, and debates grew

1. To preside and recognize.

more partisan, the Speaker's power to "recognize" members developed in importance. With limitations upon the time available for the discussion of any subject, and several members desiring to be heard, the Speaker found himself able to direct the course of debate in favor of his own friends. For no member can address the House without first obtaining the Speaker's recognition. When two members rise to be recognized the Speaker keeps his eyes under perfect control; he has entire discretion to see one and not the other, but his recognitions are to some extent determined by established custom. In a general debate, for example, the Speaker always gives turn about to members who are supporting and those who are opposing a measure. To facilitate this, he is usually supplied with a list of those who desire to speak on one side or the other.

2. To maintain order.

Likewise the Speaker has the right to call any member to order. This he does by a word of caution or by banging his gavel. The rules of the House with respect to order are strict. Members must keep within bounds in their references to one another, must address the chair respectfully, must not wear hats or smoke in the House, and must obey the Speaker's rulings. If a member persists in any violation of the rules the Speaker may "name him," that is, call him by name and reprimand him, this being an ancient practice inherited from the House of Commons.[1] In extreme cases the Speaker may suspend business until his rulings are obeyed, or he may instruct the sergeant-at-arms to quiet any disorder in the House. But the Speaker cannot expel a member. Only the House itself can do that.

3. To interpret and apply the rules.

The Speaker has always had the right to interpret the rules of the House and to settle disputes arising under them. On many matters the rules are quite explicit, and the Speaker has no choice but to apply them. He is also under a certain obligation to follow the established precedents, although it is within the power of the

He may make new precedents.

Speaker to disregard a time-honored precedent and to create a new one. The most notable example of such action, and the one most commonly cited, is a precedent established by Speaker Thomas B. Reed with reference to what constitutes a quorum of the House. The constitution prescribes that "a majority shall constitute a quorum to do business," but does this mean that a majority of the House must be recorded as voting on a measure

[1] For an explanation see *below*, p. 326.

or merely that a majority of the members must be present, whether voting or not? A member, of course, has the right to refuse to vote either *Yea* or *Nay* when his name is reached during a roll call.

Speaker Reed's ruling on what constitutes a quorum.

For more than a hundred years the former interpretation was accepted and a quorum was not deemed to be present unless the roll call showed a majority of the entire membership to be recorded either for or against a measure. This repeatedly led to the blocking of business by members of the minority party who, although in their seats, would one by one answer "Not Voting" when the roll was called, and thus prevent the official record from showing the presence of a quorum. In 1890 Speaker Reed directed that the names of all those members who were present but not voting should be added to the record and that if the total proved to be a majority of the entire membership, the House should be deemed to have a quorum. Although this new ruling was bitterly resented at the moment, the House ultimately concurred with the Speaker in his contention that the rules should be interpreted so as to expedite business, not to impede it, and the new method of counting a quorum is in effect today. Thus ended the old practice of breaking a quorum by refusal to vote.

Some great Speakers.

Meanwhile this power to make precedents, and to break them, enabled the Speaker to acquire a dominating influence over the course of business in the House. He drew into his hands the right to appoint committees, to give certain matters of business priority over others, and to reject motions or amendments which seemed dilatory in purpose. No succession of weak men could have brought the office of Speaker to this pinnacle of power. The men who occupied the chair during the greater part of the nineteenth century were strong in will and personality. It is easy to see how Henry Clay, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, Joseph G. Cannon, and Champ Clark would leave their impress upon the rules and the rulings. They were statesmen of dominating force, although by no means all of high political standards.[1]

Nor was it merely a matter of strong personalities. The Speaker's power grew hand in hand with the growing authority of the committee on rules, of which he was chairman. Originally

[1] In the long list of Speakers only one subsequently became President (James K. Polk), but three others were unsuccessful candidates for the presidency (Henry Clay, John Bell, and James G. Blaine). Two others (Thomas B. Reed and Champ Clark) came close to winning a presidential nomination from one of the major parties.

His old relation to the committee on rules.

the committee on rules was a special (not a regular) committee, its only function being to recommend a set of rules for the House at the beginning of each new Congress. This task was a relatively inconsequential one because the committee, as a matter of usage, merely recommended that the rules of the preceding Congress be adopted with perhaps a few minor changes. In time, however, there grew up the practice of referring to this committee all proposals for alterations in the rules during the course of each session, and in 1880 it became one of the regular standing committees of the House. Eleven years later it was given the right to report a new rule at any time or for any purpose, thus enabling it to intervene and cut a knot whenever business in the House became tangled. Out of this authorization the committee on rules, with the Speaker as its chairman, soon developed a rule-proposing power which amounted to a virtual control over the progress of all measures in the House. With the committee on rules ready to do his bidding, and a majority of the House on his side, the Speaker could secure at any time the adoption of a special rule to advance measures which he favored, or to delay measures which he opposed.

The "revolution of 1910–1911."

The House could not be expected to tolerate this legislative dictatorship forever, and the mutterings against it became louder as time went by. Members found that they had to make terms with the Speaker and do his bidding before their measures had any chance of passage. But not until 1910 did a favorable opportunity to change the system arrive. In that year the Progressive Republicans combined with the Democrats to clip the Speaker's wings. As the outcome of a dramatic uprising they took from him the power to appoint the committee on rules, increased its membership, and provided that the Speaker should henceforth be ineligible to a place on it. The committee on rules is now made up of twelve members who are chosen, like other committees of the House, by the House itself. Its powers remain as before, but the Speaker is no longer in a position to dictate what this committee shall do.

The appointment of committees:

The "grand remonstrance" of 1910, moreover, did not end the wing-clipping process. There was another prerogative of the Speaker which the House decided should be taken away from him also. This was the power to appoint the chairmen and members of all other House committees. Fundamentally this power belongs

to the House itself, but as a matter of convenience the duty of appointing committees was turned over to the Speaker in days when the House was small and the work of its committees relatively unimportant. Towards the close of the nineteenth century, however, when its membership became so large that the House had to do nearly all its work through committees—then the selection of committeemen became far more vital. Being a power of great importance the Speaker held on to it and used his appointing power to get committees that would do what he wanted in the way of reporting bills or pigeonholing them. If the Speaker and his "machine" favored a high tariff, he would give the ways and means committee a safe majority of high-tariff congressmen; if he desired that Congress should leave the railroads alone, he would make sure that men of similar inclination were appointed to the committee on interstate commerce.

The old method.

The Speaker, in a word, named the committees, and the committees controlled the process of legislation. One man, in this way, played a large part in determining the spirit of the laws. The Speaker became, next to the President, the most powerful figure in American government. Congressmen tiptoed to his room to learn whether their measures would pass—and they usually got a correct prediction, even before the bills had been referred to committees. Lobbyists, who wanted a measure killed, went to the Speaker and sometimes came away happy—even before the bill had been given its first reading. This was not lawmaking by due process, but lawmaking by decree. The marvel is that the House endured such a dictatorship for so many years, but the adroit politicians who occupied the chair, one after another, were able to keep the lid clamped down until 1911, when the explosion came and the autocracy of the gavel was brought to an end.

How it enhanced the Speaker's power.

Committees of the House

All regular committees are now ostensibly appointed by the House. But what really happens is this: When a new Congress assembles, the members of each political party in the House hold a caucus. Each caucus selects a group of its own members to represent it and these groups arrange the slate of committees between them. The Republican caucus appoints a "committee on committees" which arranges the various assignments of Republican members. The Democratic caucus appoints the Democratic mem-

The new method.

bers of the committee on ways and means and these committeemen then determine the assignments of Democratic members. The proportion which each party obtains on all committees is fixed by custom and depends on its relative strength in the House as a whole. The two groups work independently and then their lists are put together into a combined slate. Thereupon the final slate is submitted by each group to its own caucus, and having been approved there, is reported to the House which accepts it without change. So while it is technically accurate to say that the House appoints all its regular committees, the actual selection is in the hands of groups representing the party caucuses.

Usage in the selection of committees.

Taking the appointing power away from the Speaker has not made much change in the personnel of the House committees. This is because these committees are still made up in accordance with certain unwritten rules or usages just as they were prior to 1911. It is well understood, for example, that seniority must be recognized in making up the lists. All the important chairmanships go to members of the majority party who have had the longest continuous service on their respective committees. Places on most of the major committees are likewise given to senior members of both parties. The best that a new member can ordinarily expect is an assignment to one or two of the less influential committees. Then, if he is reëlected to the next Congress, he can expect something better. In time, if his party continues to control the House and his own district continues to reëlect him, he may rise to be the ranking member of the committee and eventually its chairman. Various considerations besides seniority are also taken into account. Geography, for example, is a factor. Not all the members of any major committee are ever selected from any one section of the country. Likewise a congressman's personal preferences are usually taken into account. But his individual ability and his qualities of leadership rarely have much to do with it. In order to become chairman of a committee, therefore, a congressman need only live long enough, get himself continually reëlected, and stay on the same committee.

Chairmanships.

Objections to the "seniority" rule.

In many ways this is unfortunate. It holds back men who have a natural aptitude for getting committee work done, and pushes forward others who have little or no administrative ability. The House depends upon its various committees for the success of its work, and the committees, in turn, lean on their chairmen. Some-

times they find themselves leaning on a slender reed, for length of service is no guarantee of anything except a congressman's capacity to get votes in his home district. All this is well recognized, and from time to time there have been proposals to give up the seniority rule. But it is not certain that the gain would outweigh the loss. The procedure of Congress has become so complicated that none but experienced members can thread their way through its meshes, hence the senior congressmen are bound to be influential no matter how the committees are made up. If the seniority rule were abolished there would probably be a long and bitter fight over committee assignments at the beginning of each new Congress, thus delaying and rendering more difficult its work during the remainder of the session.

The organization of House committees.

The House has forty-seven "standing" or regular committees, but of these only about thirty have any important work to do. The rest hold only one or two meetings a session, and a few never meet at all. Some of them, like the committee "on the disposition of useless executive papers," are as torpid as a hibernating amphibian. These inactive committees are maintained, year after year, because the chairman of a committee, no matter how inconsequential it may be, is entitled to an office, an allowance for clerk hire, and various other perquisites. It occasionally happens, of course, that some incident will arise to give work of importance to a minor committee and galvanize it into action; but otherwise it merely "meets at the call of the chairman," which means that it may be allowed to forget its own existence.

The most important committees.

The most important committees are those on rules, ways and means, appropriations, judiciary, interstate and foreign commerce, post offices and post roads, military affairs, naval affairs, rivers and harbors, agriculture, public lands, labor, civil service, immigration, pensions, banking and currency, enrolled bills, Indian affairs, and insular affairs. In most cases the functions of these committees are indicated by their titles. In size the standing committees vary greatly. The largest is the committee on appropriations, which has thirty-five members; the others have from eleven to twenty-one members each, usually the latter number. No member of the House may serve on more than four regular committees and rarely is anyone assigned to that number; but some of the senior congressmen serve on one important committee and two or three minor ones. Even new members are sometimes placed on two or three com-

mittees. But the majority party in the House always gives itself a safe margin on every committee. The chairman of each committee is named when the committee is appointed. The major standing committees meet frequently, using for this purpose the forenoon hours when Congress is not sitting. Each committee has a room for its own use and is provided with a regular secretary.

The subcommittees. So much work is now thrown on the more important committees that they are compelled to apportion a good deal of it among subcommittees. These are appointed by the main committees, usually through their chairmen, and are given some specific matter to deal with, for example, the overhauling of the income tax schedules, or the revision of the postal laws. Occasionally one of these subcommittees will hold the hearings on a measure, thus saving the time of the other committee members. Subcommittees always report to the main committee and not to the House.

Special committees. From time to time the House orders the appointment of special committees to deal with some new and out-of-the-usual question. In the early days it appointed such committees very frequently but there are now so many regular committees, and their range is so inclusive that special committees are not often needed. Like the Senate, the House also has the right to appoint committees of investigation and occasionally it does so.[1] Such committees are empowered to summon witnesses, examine them under oath, and compel the production of papers. The rules of the House still allow the Speaker to appoint such special committees when they are needed, and also to appoint House members of conference committees.

Conference committees. These conference committees are special committees in that they are appointed to perform a single definite task and when that is done they immediately dissolve. It may take them only an hour, or their conferences may drag on for weeks. The reason for committees on conference has been already explained, namely, that when the House and the Senate fail to agree upon any measure, one of them having passed it with amendments which the other declines to accept, it becomes necessary to get representatives from both chambers into conference with a view to reaching a compromise. So the presiding officers of the Senate and the House each appoint a small group of conferees, usually three from each chamber. This joint committee of conference then meets behind closed

[1] For the basis of this power to conduct investigations, see *above*, p. 293.

doors and tries to patch up something that both the Senate and the House can be persuaded to accept. The problem of doing this may be an easy one—merely splitting the difference on a few items. Or it may be that there are many differences to be taken up, one by one, and adjusted by the process of give and take. A conference committee is not supposed to put into a measure anything that is not already there, but sometimes this limitation is disregarded and a general reshaping of a bill at the hands of the committee is found essential in order to make it acceptable. Sometimes, moreover, the conferees are unable to agree at all, in which case they so report and the whole measure fails of enactment. But if they reach an agreement they report it to their respective chambers and usually get it accepted. A report from a conference committee is privileged, that is, it may be presented at any time and no amendments to it are in order.

Committee of the whole.

Mention should also be made of one other House committee, the committee of the whole. This is merely the entire membership of the House sitting as one great committee. The purpose is to expedite business, and to this end there are several important differences between the House in committee of the whole and in regular session. In committee of the whole the Speaker does not preside, but calls upon some member to act as chairman; the strict rules of procedure do not apply; the previous question may not be moved; one hundred members make a quorum; there are no roll calls; and no member may speak longer than five minutes except by unanimous consent—in a word the arrangement enables the House to debate informally and push ahead. Large use is made of this facility, and the House probably sits a larger number of hours in committee of the whole than in regular session.

Business on the Floor

Addressing the Speaker.

Except when the House is sitting in committee of the whole, the Speaker is in the chair. Members customarily arrange in advance with the Speaker (either directly or through a floor leader) to be recognized when they rise, but any member has the right to ask recognition without this prearrangement and take his chance of getting it. He merely rises and addresses the chair: "Mr. Speaker, Mr. Speaker." Turning to him the Speaker asks: "For what purpose does the gentleman rise?" This is to determine whether the member's purpose is in order. Then the Speaker, if he decides to

accord recognition, taps his gavel and announces, "The gentleman from Illinois," or "The gentleman from Texas." Members of the House are not addressed by name from the chair (except by way of reprimand), or by one another in debate. After being thus recognized, a member launches into his speech but may be interrupted by any other member and asked to "yield the floor" in order that some explanation or brief interpolation may be made. Whereupon the Speaker inquires, "Does the gentleman yield?" The member having the floor may then yield or not as he chooses, but the usage of the House is that a member does so when requested.

When the Speaker makes a speech.

The Speaker may himself take the floor, and occasionally does so, but not so often as in the old days. Henry Clay, when he served as Speaker, used to project himself regularly into the thick of debate. When the Speaker desires to participate in the discussion he calls some member to take the chair temporarily. But whether in the chair or out of it, he has a vote on all questions and not merely in the event of a tie, as is the case with the Vice President of the United States who presides in the Senate. By becoming Speaker he loses none of his rights or privileges as a member. Having once voted on a question he may not, however, vote again to break a tie. In the case of a tie, if the Speaker has already voted, the motion is deemed to be defeated. In a roll call on ordinary measures the clerk does not call the Speaker's name unless the latter requests it; but in calling the roll to determine the presence of a quorum, or to pass a measure over the President's veto, the Speaker is expected to vote.

The floor leaders.

Leadership in the House of Representatives is exercised not only by the Speaker but by the floor leaders. Each party has its floor leader, selected by a caucus of its members at the beginning of every Congress. He is the general strategist for his party colleagues. When an important debate is in the offing, the two floor leaders get together and agree upon the amount of time which is to be allotted to each side. Then they make up a list of those who are to take part in the debate, so that the Speaker may recognize both sides fairly. Sometimes the majority floor leader, or the chairman of the committee which has reported the bill, may start the debate and then yield the floor to one of the members on his list who in turn yields it to someone else. Debating in the House is not left to run its course haphazard. So far as practicable, everything is cut and dried in advance. The floor leaders are ex-

pected to keep things moving, yet not to let them get out of hand.

The party caucus.

If matters seem to be getting to a point where the floor leaders are unable to hold their followers in line, there is always the party caucus to fall back upon. A caucus is merely a meeting of party members to decide upon a course of action. Congressmen are not obliged to attend a caucus of their own party when it is called, but if they do attend they are regarded as being morally bound to abide by its decision. Caucus action is not usually taken except on measures which have become party issues. On bills of a routine sort, or which cross party lines, the members are left free to decide their votes for themselves. A good deal of criticism has been showered upon this practice of binding members by caucus decisions, but something of the sort has been found essential in the legislatures of all countries which have the party system.

The Process of Lawmaking

The steps in the making of a law:

Having noted the functions of the Speaker, the floor leaders, the caucus, and the committees, we are now in a position to follow more easily the several steps in the process of lawmaking.

1. How bills are introduced.

In the first place any member of the House may present a bill or resolution. It may be one that he himself has prepared and favors, or it may be one that any outside individual or organization has asked him to introduce. Strictly speaking, there are no "government measures" in either the Senate or the House, as is the case in the English parliament. Neither the President nor any member of the cabinet can introduce a measure directly, but they may have some senator or representative introduce it for them and announce that the administration desires to have the bill passed. If a congressman desires assistance in drafting a bill there is a legislative reference service at his disposal, with expert draftsmen attached to it.

Where they "originate."

Literally thousands of bills and resolutions are introduced in the early days of each session. Every member of Congress puts in a batch of them, usually at the request of someone else. Organizations of every sort, and individual citizens, ask congressmen to serve them in this way. Ninety per cent of these bills call for the spending of money. Of the rest, the majority call for favors of some kind to somebody. They represent an ambition, a grievance, a hope, a cause, or a crusade. It is a euphemism to say that bills

"originate" in Congress. They come from every corner of the land.

The flood of bills.

The procedure in introducing a measure is simplicity itself for the congressman merely writes his name on the bill and places it in a capacious box which reposes expectantly on the clerk's desk. If he feels dubious about the merits of the measure he takes care to write "introduced by request" above his name. This relieves him from the responsibilities of fatherhood. The freedom with which bills may be introduced has both good and bad features. It gives reality to the constitutional right of petition and encourages the putting forth of new legislative ideas. On the other hand, it permits Congress to be swamped with all manner of ridiculous proposals which have no earthly chance of being adopted. Many of these are hardy perennials which sprout up every year, sometimes for a whole generation. Some have merit but no influential support; some have influential support but no merit. Only a few hundred bills out of the many thousands have both. And they are the only ones that get beyond the initial stage.

2. Reference of bills to committees.

Presently, however, all the bills and resolutions are sorted out, given serial numbers, and referred to committees. In the case of so-called private bills (see p. 331) the member who introduces the bill indicates the committee which he thinks ought to deal with it. All other bills have their destination decided by the Speaker. If there is any doubt as to what committee should have a particular bill, the Speaker may delay reference and think it over. Sometimes he settles the question by dividing the bill between two committees. Meanwhile the measure is put into printed form at the public expense. If it is of great importance, the committee to which it is referred may assign different parts of it to subcommittees. Committee hearings are usually public, but the subsequent discussion by members of the committee is conducted behind closed doors.

3. Committee hearings.

In any case the committee or subcommittee will hear all who want to be heard either for or against the bill. This is done as a matter of courtesy, not of constitutional right, as many people seem to think; but the opportunity to be heard before a committee is practically never denied to anyone. Each committee has a room with seats for the public. If many persons desire to appear before the committee, the hearings may last for weeks. Sometimes, when the hearing is on a very important bill, the room is jammed with

advocates, opponents, and newspaper men. Lobbyists and paid attorneys may appear and argue for or against the measure, so that the committee room sometimes takes on the atmosphere of a court. The members of the committee ask questions and sometimes enter into an argument with the individuals who are addressing it. Occasionally there are sharp passages while the chairman raps loudly for order. Stenographers take down the proceedings so that the committeemen may study the material at their leisure,—which they rarely do. Committees sit in the forenoon, because no committee, except the committee on rules, may hold meetings while the House is in session unless it secures special permission. When a hearing is finished, the committee decides, either at once or on a later day, whether it will report the measure to the House.

Their value.

Members of the committees get a good deal of information (and misinformation) from these hearings. They can also get data in other ways. The Library of Congress is close at hand, with rich material on every subject. Some congressmen spend time in it, looking up information for themselves. Others get the legislative reference service to provide it for them. Many do neither, but trust to their own sagacity in winnowing the wheat from the chaff in what they hear. A committee may also call upon the administrative departments for data and information—upon the department of commerce or the department of agriculture, for example. But information about the merits and defects of a measure is not the only thing that the average congressman wants to know.

The pressure from outside.

What his own voters will think about it is important also, and this cannot be discovered by listening to attorneys or reading in the library. Any congressman's secretary, who opens and reads his telegrams and mail, can give him better information on that point. Sometimes he gets hundreds of these communications in a single day, for the practice of stimulating voters to "write or wire your congressman" has developed to enormous proportions in recent years. Most of these communications, however, are the outcome of activities carried on by self-interested pressure groups. Congressmen know this full well, and make proper allowance for it in their endeavors to size up the public reaction to measures which they are considering.

Several courses are open to a committee with reference to bills which it has under consideration. The committee may report a

4. What action the committee may take.

bill just as it stands. In that case the measure will have a good chance of passing, especially if the favorable report of the committee is unanimous. Or the committee may approve the bill with some amendments of its own. As a third alternative, it may redraft the measure and submit it in altered form. It may even present an altogether new and quite different bill. In any event when a favorable report is made upon any measure, either in its original, revised, or new form, the report goes to the clerk of the House, who enters it upon the journal, and in due course it is set upon one of the calendars for a first reading. Certain committees have the privilege of reporting at any time directly from the floor of the House, although this is not usually done.

The asphyxiation of bills in committee.

When a committee is not favorably impressed by the merits of a measure it does not go to the trouble of making a report at all. The bill is merely "pigeonholed," that is, pushed into the discard compartment of the chairman's roll-top desk. That is what happens to most of the measures which a committee receives. Among the many thousands of bills introduced at each session of Congress the great majority have no chance of ever getting a place on the House calendars. On the average a committee reports about five per cent of the bills referred to it; the rest clutter the pigeonholes for a season and are then carted down to the Capitol furnace.

Instructing a committee to report.

The simplest way to kill any measure is, therefore, to have a committee refrain from reporting it, because no bill can be acted upon by the House until a committee sends it up. It is possible by a rather complicated procedure for the House to call up a bill from the hands of a committee and proceed to act upon it; but this is not done except in rare instances. In a negative sense, therefore, a committee's decision is virtually final. Favorable action by a committee does not, of course, mean that a bill is assured of passage; but adverse action, which is no action at all, becomes a sort of automatic asphyxiation. Thus the committees serve as the lubricants of the legislative machine and keep it from becoming clogged.

Procedure in the House:

When a measure is reported to the House by a committee, it goes on one of the five calendars. The first of these, known as the Union calendar,[1] contains all favorably reported measures relating to revenue, appropriations, and public property. A second, called

[1] Its full title is "Calendar of the Committee of the Whole House on the State of the Union."

the House calendar, includes all public bills not included in the foregoing category. The third, known as the calendar of the committee of the whole, or the private calendar, makes a place for all measures of a non-public character.[1] The fourth calendar contains measures which it is desired to advance by unanimous consent. If any member objects to the placing of a bill on this calendar, it is struck off and must take its turn on one of the other calendars. Finally there is a special calendar on which are placed all proposals to instruct committees as, for example, instructions to bring in a report on a certain measure. Measures on these various calendars are not necessarily, or even usually, taken up in order; the House may call them up out of turn, and this is frequently done because the first three calendars become so long that bills which stand near the bottom cannot be reached before the end of the session.

1. The calendars.

There are various ways of getting a bill advanced from its regular place on the calendar. Revenue and appropriation bills can be given the right of way by majority vote of the House at any time. Special days are set apart for a designated class of measures. Items on the Union calendar, for example, are exclusively given consideration on certain days, and other days are customarily set aside for the House calendar. On the first and third Mondays of each month, moreover, the House can suspend its rules by a two-thirds vote and push any measure through without regard for the regular order of business.

2. Calling up bills.

This regular order of daily business is about as follows: First comes the routine opening, with a prayer by the chaplain and the reading of the previous day's journal. Next in priority is any business on the Speaker's table (such as a message from the President, or a bill that has come back from the Senate with amendments), after which the House takes up unfinished business from the day before. It is only when all this has been gone through that the "morning hour" begins.

The opening proceedings.

At every daily session there is a morning hour (it may be an hour or a whole day) which is set apart for the consideration of bills called up from one of the calendars by committees which have reported them. Then, if time permits, the House goes into committee of the whole to discuss revenue or appropriation bills on the Union calendar, or some other public bills on the House calendar.

The "morning hour."

But this regular order of business is interrupted by the interven-

[1] For example, bills granting pensions to designated individuals.

Special days.

tion of the special days which are allotted to the favored calendars or to specific matters, such as business relating to the District of Columbia. It is also interrupted by reports from privileged committees (such as the committee on rules), or by votes of the House giving certain measures an arbitrary precedence over all others. In fact it can fairly be said that towards the end of a session the regular order of business is almost wholly lost to view in the general stampede for a place in the front line. Every congressman, in these end-of-the-session days, is working frantically to get his own measure out of the legislative jam. Only a few of them are worth salvaging, so the House picks the ones that seem to be most deserving, or which have the largest backing among its members, and these it shoves ahead of the rest. "Congress," it has been aptly said, "is a single-track road." [1] Passenger trains (important or urgent bills) get the right of way. There is so much traffic that a lot of perishable freight has to be shunted to the sidings.

3. The three readings.

Every bill, of whatever sort, must be given three readings. The first reading is by title only; the second is a reading of the measure in committee of the whole. At this stage amendments may be offered. The real discussion and scrutiny of the bill, so far as the whole House is concerned, takes place at this second reading. When the committee of the whole has finished with the measure it reports to the House in formal session. Then the third reading is given, but this is also by title unless some member requests that it be again read in full, which hardly ever happens. A debate may take place on the question of passing the measure to its third reading, and more amendments may be offered, but they are not likely to be adopted. If the measure passes its third reading, it is engrossed (or carefully typed by engrossing clerks), signed by the Speaker and transmitted to the Senate for concurrence.

How votes are taken.

Four methods of voting are used in the House. The common plan is by *viva voce* vote. Any member may doubt the result and call for a rising vote. If a certain number of members so demand, the vote is again taken by tellers who are appointed by the Speaker. The members pass between tellers and are counted. Finally, the constitution provides that if one fifth of the members ask for it, the *Yeas* and *Nays* shall be recorded. A roll call must always take place when the passing of any measure over the President's veto is

[1] D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), p. 222.

being decided. If a member expects to be absent at the time when the vote is to be taken, he pairs off with some member on the other side who also expects to be absent. This is arranged by notifying the clerk.

Bills sent to the Senate for concurrence.

When the House has finished with a measure and transmitted it to the Senate, what does the latter body do with it? It may do any one of three things: It may pass the measure without change. It may reject the bill outright, or let it die at the hands of a Senate committee. For Senate committees, like those of the House, have the privilege of pigeonholing all measures which they do not like. More often, however, the Senate will pass the measure after making some amendments. In this case it must come back to the House for a vote on acceptance of such amendments. If the House accepts them, well and good; but if it declines to do so, the matter goes to a conference committee as has already been explained.[1] Nothing can become a law unless both Houses have concurred upon every word of it.

The final steps in congressional legislation.

Finally, when a bill has passed its various stages in both chambers, it is laid before the President for his approval or veto. If signed by the President, or if allowed by the efflux of ten days to become a law without his signature (as the constitution provides) it goes to the archives of the state department and in due course is published in the statute-book of the nation. That, in brief, is the biography of a typical law. On the way to its destination there are many pitfalls, and among the myriad bills that are born there are only a few which manage to avoid all of them.

A child of the "Mother of parliaments."

The House of Representatives was created in conscious imitation of the House of Commons and it still bears, in many respects, the imprint of its paternity. Look down from the gallery and you will notice, standing in a marble pedestal beside the Speaker, a gilded staff surmounted by an eagle. When the House adjourns you will note that the sergeant-at-arms takes this staff from its place and carries it out. When the House resumes, he brings it back. When he is commanded by the Speaker to restore order, he shoulders this mace (as it is called) for it is his symbol of authority. But how many congressmen know that the mace, and all the ritual pertaining to it, developed in England long before America was discovered? There it was originally a symbol of the royal presence in the House of Commons while the king presided at sessions of the

[1] *Above*, pp. 324–325.

House of Lords in person. The mace at Westminster is topped by a gilded crown, and at Washington by a gilded eagle; but alike they are the emblems of national power.

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CHAPTER XIX

THE GENERAL POWERS OF CONGRESS

The basis of our political system is the right of the people to make and to alter their constitutions; but the constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory on all.—*Washington.*

Congressional powers.

The Senate and the House of Representatives together constitute the Congress of the United States. Before attempting to explain the specific powers of this body it is desirable to present a general view of its powers as a whole, their nature and source, their scope and limitations, as well as the direction in which they have been developing, especially in recent years.

More than a law-making body.

Congress is commonly spoken of as the lawmaking branch of the national government, but it is a good deal more than that. Broadly regarded, it is the instrument by which the people frame, declare, and supervise the policies of the nation. It votes money and directs how the money shall be spent. It has the right to conduct all investigations which it may deem desirable as an aid to its work. It may even punish for contempt any person who refuses to give information during these investigations.[1] Thus it possesses a quasi-judicial power. It may, by action on the part of both its Houses, impeach and remove any civil officer of the United States. It canvasses the electoral votes every four years and under certain circumstances, as already explained, its individual Houses may choose the President and Vice President. Finally, it declares war—by resolution, not by statute.

Nevertheless, with all its vast endowment, the authority of Congress is in no sense an unlimited power. Unlimited power cannot be exercised by any branch of American government,—executive, legislative, or judicial,—or even by all three acting together. Limitations there are to a greater extent than in any other country, and the greatest of these limitations upon the powers of Congress arises from the theory of the constitution itself.

[1] McGrain *v.* Daugherty, 273 U. S. 135 (1927). See also M. E. Dimock, *Congressional Investigating Committees* (Baltimore, 1929), and E. J. Eberling, *Congressional Investigations* (New York, 1928).

The powers of Congress are delegated powers.

The Constitution of the United States, as has been already shown, is a grant or delegation of powers. In that respect it differs from the constitutions of the several states, for in the states all powers accrue as an incident of their original sovereignty. By the national constitution Congress gets only what is therein given; by the state constitutions every state legislature gets whatever is not expressly taken away. This difference is of vital importance, so vital that it can scarcely be overemphasized. The national constitution is the source, and the sole source, of all the authority possessed by Congress.

Are there "inherent" powers of international sovereignty?

Occasionally it has been argued that since the United States is a sovereign nation in its dealings with other countries, its legislative body (Congress) must have all the powers which go with international sovereignty whether they are conferred by the constitution or not.[1] Among such powers are the right to acquire new territory, to set up consular courts in foreign countries, and to restrict immigration. But virtually all the authority which a sovereign nation would commonly exercise in its dealings with other countries is already given to Congress by the treaty-making power, the power to regulate commerce, and the other broad powers which the constitution expressly lodges in the federal government.

The twilight zone of authority.

From time to time, likewise, the theory has been advanced that since there is a no-man's land intervening between the jurisdiction of the states and that of the federal government, the latter is entitled to take possession of this area. In other words, whenever there is a problem which would ordinarily fall into the residual category of state powers, but which is in fact beyond the active power of a state to handle—in such cases the national government should be permitted to deal with the problem. President Theodore Roosevelt argued for such a doctrine in one of his books.[2] Other writers, within the past few years, have gone so far as to contend that Congress has power to do anything which the general welfare may require.[3] But the Supreme Court has not been impressed with this line of reasoning and has always rejected such constitutional philosophy as inconsistent with the plain meaning of the tenth amendment.

With respect to the various powers which the constitution con-

[1] See W. W. Willoughby, *The Constitutional Law of the United States* (2nd edition, 3 vols., New York, 1929), Vol. I, p. 90.

[2] *The New Nationalism* (New York, 1910).

[3] James F. Lawson, *The General Welfare Clause* (Washington, 1934).

fers on Congress two historic questions have arisen. The first was this: Can the grant of authority to the federal government be revoked? The several states, it is admitted, gave Congress certain powers in 1787. Can these individual states resume any of the powers which they bestowed at that time? Can a state nullify any power which is given to Congress by refusing to recognize the exercise of such authority? The second issue concerned itself with whether a state could resume all its original powers by seceding from the Union. Nullification and secession, in other words, are two historic issues in the history of American government, but both have long since been settled by the march of events.

Two historic issues:

South Carolina in 1832 made her famous gesture of nullification based upon the contention that whenever Congress went beyond the limits of power granted to it by the constitution, any state was at liberty to declare such action unauthorized and null. This doctrine found its advocate in John C. Calhoun.[1] According to his interpretation of the constitution the states could refuse to obey any federal law which they deemed to be unconstitutional. Acting upon this conception of ultimate state sovereignty, South Carolina in 1832 attempted to nullify certain tariff laws which Congress had passed. But the attempt did not succeed. The federal government under President Andrew Jackson's leadership took up this gage of battle and South Carolina was persuaded to recede from her position of defiance.

1. Nullification.

The question whether a state had the right not merely to refuse obedience to acts of Congress but to withdraw from the Union altogether, and thus to repudiate the compact of 1787, came to the front in a much more serious form twenty-eight years later. Threats of secession had been made by various states from time to time during the first half of the nineteenth century, but it was not until December 20, 1860, that any state took the actual step of seceding. On that date South Carolina once again assumed the initiative by declaring that "the union now subsisting between South Carolina and other states under the name of the United

2. Secession—a far more difficult problem.

[1] Calhoun's doctrine may be summarized into four propositions, viz., 1. The Union is a compact of equal states. 2. The federal government was created by the states as their agent to carry out the terms of this compact as embodied in the constitution. 3. The act of an agent, if beyond the scope of its authority, is null and void. 4. Each state has the right to decide for itself whether an act of the federal government is beyond the scope of its powers. For a full statement of the doctrine see his *State Papers on Nullification* (1834), also David F. Houston's *Critical Study of Nullification in South Carolina* (New York, 1896).

States of America is hereby dissolved." Within a few months ten other southern states took similar action.

Claims of the secessionists.

The right to secede from the Union and thus to reacquire all the powers which had been surrendered to Congress in 1787 was based upon several contentions which need not be enumerated here. They may be epitomized in the old claim that the constitution was nothing more than a treaty or compact among the states, and that the violation of its terms or spirit by some of the states freed the others from the obligation of being further bound by it.[1] Webster and others replied that the constitution was not a compact among the states but an agreement among the people. They pointed to the very first words of the constitution, "We, the people of the United States . . . do ordain and establish this constitution." The southern statesmen retorted by pointing to the very last words of the constitution which provided for the establishment of the constitution "between the states so ratifying the same."

And the outcome of these claims.

During the years preceding the Civil War the question was argued from every angle and with all manner of legal ingenuity. Both sides appealed to history, and distorted history, in order to support their respective contentions. As for the constitution itself, it was found to be as mute as a dying gangster on the question whether the states could withdraw from the Union after once entering it. Nothing was said about that matter in the convention of 1787, and naturally so, for the framers of the constitution were not worrying about how to let the states out of the Union, but how to get them in. Along with many other far-off issues they left this one for posterity to handle if it should ever arise. And eventually it did arise. Men wrangled about it in Congress, waged four years of bitter warfare over it, and finally settled the issue at Appomattox.

Perpetual nature of the Union established.

Blood and iron gave their verdict in 1865. Since the day that Lee offered his sword to Grant this stormy petrel of American politics has been at rest. No state has the right to take back any of the powers or functions which it agreed to give to the national government by the compact of 1787. These powers form the permanent endowment of Congress. They can be withdrawn in one way only, that is, by the concurrence of three fourths of the states as provided in the constitution.

[1] Jefferson Davis, President of the Confederacy, in his message to the Congress of the Confederate States (April 29, 1861) gave a full statement of the secessionist doctrine. This is elaborated in his *Rise and Fall of the Confederate Government* (2 vols., New York, 1881), Vol. I, pp. 1–258.

Summary of the constitutional bases of congressional powers.

Three points, accordingly, are now well established in American constitutional jurisprudence. First, the constitution is a grant of powers and Congress has no lawmaking authority save as is therein conveyed. Second, within its own sphere, as delimited by the constitution, the authority of Congress is supreme. Third, no state has any right to nullify this supremacy by a refusal to recognize it, nor may individual states secede from the jurisdiction of the federal government.

> "The government of the Union," said Chief Justice Marshall, "is acknowledged by all to be one of enumerated powers. But it is emphatically and truly a government of the people, in force and substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit. The people did not design to make their government dependent on the states. Therefore, the government of the Union, though limited in its powers, is supreme within its sphere of action. Its laws, when made in pursuance of the constitution, form the supreme law of the land. It is the government of all that acts for all." [1]

The expansion of federal authority.

But although the powers of Congress, as Marshall says, are limited to those enumerated in the constitution, this does not mean that no new powers can be added. Additional authority can be given to Congress by constitutional amendment and on more than one occasion this has been done. A noteworthy example was afforded by the sixteenth amendment (1913) which greatly widened the taxing power of the national government. Moreover, as has already been pointed out, the powers of Congress have been steadily widened by the process of judicial interpretation. A government of enumerated powers is not by any means a government of static powers.

Can Congress delegate its powers to executive officers?

When Congress possesses a power must it exercise this power directly or can it delegate the authority to someone else? Having the power to levy taxes, for example, can Congress turn over to the secretary of the treasury, or to a tax board, the function of determining what shall be taxed and at what rates? The answer is in the negative. Powers granted to Congress by the constitution cannot be farmed out but must be exercised directly. That is, the substance of power must not be delegated. On the other hand it is obvious that Congress cannot be expected to embody in statutory form all the minor regulations which are needed in connection

[1] McCulloch *v.* Maryland. 4 Wheaton, 316 (1819).

with the administration of the laws. Hence it is allowable to authorize some executive officer (usually the President, or the head of a department, or a national board such as the interstate commerce commission) to make these detailed rules. Congress lays down the general provisions by statute, but within the scope of these provisions it may give discretionary power to some federal officer or board. And this discretionary power may be of far-reaching scope as has been demonstrated within the past few years.[1]

The Schechter Case.

This principle that the substance of legislative power must not be delegated was vigorously reaffirmed by the Supreme Court in the Schechter Case (1935). The national industrial recovery act of 1933 conferred upon the President extensive authority to approve or reject codes of fair competition prepared by industries and submitted to him. Congress, in passing this important statute, did not set up any adequate standards whereby codes should be approved or rejected by the President but left the ultimate decision to his executive judgment. The Supreme Court held that the act involved a delegation of legislative power by Congress and for that reason was unconstitutional. The court also held the act to be unconstitutional for another reason, namely, because it attempted to control industries which were not engaged in interstate commerce.[2]

Can it delegate its powers to the states or to the voters?

Some other questions arise with respect to the delegation of legislative power. Can Congress turn over any of its powers to the states? Can it submit laws to a referendum or vote of the people, as is done in some of the states? The answer is No in both cases. Power to grant patents or to establish post offices, or to fix the standards of weights and measures (all of which powers are vested in Congress by the constitution) cannot be turned over to the state legislatures. Nor is it permissible for Congress to hold a national referendum on the adoption or rejection of any measure. On the other hand there is nothing to debar Congress from authorizing an advisory referendum to ascertain the wishes of the people, so long as it reserves to itself the final decision and action.

The classification of the powers of Congress.

Having thus seen the constitutional basis of its authority and the scope of its exercise, let us turn to the actual powers of Congress. These may be classified in various ways. One method of classification is according to the form in which they are granted, whether in

[1] See also *above*, pp. 199–200.

[2] See *above*, p. 78, *footnote* 2, and *below*, pp. 441–442.

express terms or by implication. Another is according to the degree of obligation imposed by various powers, in other words whether they are permissive or mandatory. A third distinction relates to exclusive and concurrent powers. Finally, and most significant of all, is the classification of the powers of Congress according to their nature and importance.

Express and implied powers.

Does Congress possess only those powers which are granted by the constitution in express terms? Or does Congress also possess powers which, though not expressly granted, may be reasonably implied? The constitution, for example, expressly gives Congress the right to borrow money. Does that express power carry with it the implied right to issue bonds, to employ bond salesmen, and even to establish banks in order to facilitate the exercise of the borrowing power? This question arose at a very early date.

Hamilton's view.

Hamilton and the Federalists argued that there ought to be no strict construction of the constitution's terse phraseology, no reading of the words with a microscope and a dictionary. His contention was that wherever an express power had been granted, this express grant should be construed to carry with it whatever implied powers were "necessary and proper" in order to make the will of Congress effective.

Jefferson's view.

Jefferson and the Anti-Federalists took the opposite ground, maintaining that the long enumeration of express powers granted to Congress in the constitution was meant to be complete, and that other powers should not be added by implication. They argued that if this implied powers doctrine were allowed to prevail there would be no end to the expansion of the federal government's authority. Congress might assume all sorts of things to be "necessary and proper" for doing its work. The preservation of states' rights, they felt, made it essential that Congress be kept to a strict and literal interpretation of its delegated authority.

The Supreme Court's decision.

Between these divergent views the Supreme Court, in a most notable decision, took a stand which upheld the Federalist claim. "The sound construction of the constitution," said Chief Justice Marshall in this decision, "must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people." A narrow construction, he declared, would hamper the operations of government and make it incapable

of performing the functions that it was established to perform. Then Marshall drove home the court's decision in these pregnant words:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consist with the letter and the spirit of the constitution, are constitutional." [1]

An express power, in short, may be carried beyond its own phraseology. The doctrine of implied powers was thus given recognition in 1819 and it has ever since been a well-established rule or principle of American constitutional interpretation.

Scope of the "implied" powers.

Some of the most important functions which the federal government performs today have their basis in "implied" powers. The right of Congress to provide for the establishment and supervision of national banks, federal reserve banks, home loan mortgage corporations, and various other banking or credit institutions, is not an express power, for the constitution contains no mention of banks or banking. The power is implied, or at any rate has been held by the Supreme Court to be implied, in the express power "to borrow money on the credit of the United States." The right of Congress to regulate the food and fuel consumption of the country in war time is nowhere expressly granted in the constitution. It is clearly implied, however, in the express power "to raise and support armies." Nor, again, does the constitution expressly give Congress the right to regulate the stock exchanges, or the issue of securities, yet this authority is implied in the power to regulate commerce among the several states. The power to establish carries with it the power to maintain; the power to regulate implies the power to create agencies of regulation; the power to do a thing implies the right to choose the means of doing it. Bear in mind, however, that Congress is not the judge of its own implied powers. The Supreme Court is the final arbiter in such matters and on several occasions it has denied congressional claims to implied authority.[2]

Mandatory and permissive powers.

The powers granted to Congress by the constitution are for the most part permissive in character: that is to say, Congress may or may not exercise them, as it sees fit. It may use these permissive powers much, little, or not at all. The clause which provides that

[1] McCulloch *v.* Maryland, 4 Wheaton, 316 (1819).

[2] For examples, see *below*, pp. 411–413.

Congress "shall have power to borrow money on the credit of the United States" obviously does not mean that Congress shall go out and borrow money whether the country is in need of it or not. So with the power "to establish uniform laws on the subject of bankruptcies throughout the United States." We have a national bankruptcy law now, but for twenty years prior to its passage in 1898 Congress declined to assume jurisdiction in bankruptcy matters.

Phraseology is sometimes misleading on this point.

On the other hand there are some powers which, notwithstanding their permissive phraseology, are mandatory in effect. Whenever, for example, some action on the part of Congress is necessary to make a provision of the constitution effective, it can hardly be argued that the function of Congress is a discretionary one. To give an illustration: the constitution provides that the Supreme Court shall have appellate jurisdiction "under such regulations as Congress shall make." But if Congress should establish no regulations, the court would then have no appellate jurisdiction and the entire judicial system would be in chaos. Obviously the words of the constitution on this point, although they seem permissive, are in fact mandatory.

Again, the constitution provides for a reapportionment of seats in the House of Representatives after every decennial census, this census to be taken in such manner "as Congress shall by law direct." But if Congress fails to provide the machinery and the money for taking the census, the reapportionment prescribed by the constitution cannot be made. Congress is, therefore, under obligation to provide for the taking of a census even though the constitution does not specifically require it to do so. On the other hand if Congress fails to have a census taken, or neglects to provide for a reapportionment of seats after a census, as it did after the census of 1920, there is no way of applying compulsion. The Supreme Court will not order Congress to vote money or to pass a law, for if the court were to issue such an order there would be no way of enforcing it. It could hardly put Congress in prison for contempt.

Exclusive and concurrent powers.

Then there is the distinction between exclusive and concurrent powers. Where a power has been granted to the national government, and is not prohibited to the states, it may be exercised by both unless Congress assumes exclusive jurisdiction. This it may do whenever the power is one which from its nature cannot be

shared by two authorities. Congress has now assumed exclusive jurisdiction in a number of such matters, as, for example, over naturalization, copyrights, and the maintenance of post offices. In only one case has a concurrent power been expressly given to both the national and the state governments, namely, in the now-repealed eighteenth amendment.

The four groups of powers provided for in the constitution:

Broadly speaking, all legislative powers are divided by the constitution into four groups. First, there are certain powers which are forbidden to be exercised either by Congress or by the states. Second, there are various powers which are vested in Congress alone, to the exclusion of all state authority. Third, there are a few concurrent powers, which Congress and the state authorities share. And finally, there are all the remaining powers of government forming the residuum which reverts to the states.[1]

1. Powers prohibited to both the nations and the states.

The powers prohibited either to Congress, or to the states, or to both, are of a considerable range. Some are powers which no free government ought ever to exercise; for example, the power to pass bills of attainder, or to enact *ex post facto* laws, or to deprive anyone of his life, liberty, or property without due process of law. The exercise of these powers is forbidden to both the national and the state governments.

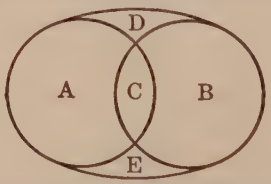
2. Powers prohibited to the states only.

But in addition there are other powers, not by their nature despotic or arbitrary, which had to be vested in some central authority and hence were prohibited to the states so that they might always be exercised by Congress alone. The states, accordingly, were forbidden to make treaties, or to coin money, or to lay taxes on either exports or imports.

3. Powers given to Congress.

The constitution contains eighteen clauses expressly granting powers to the national government, hence the customary reference to "the eighteen powers of Congress." There are really more

[1] The division may be made somewhat clearer perhaps by the following diagram:



Let the ellipse represent the totality of governmental powers. Then Circle A includes all powers granted to the national government, Circle B all powers reserved to the states; Segment C, the few powers which are concurrent powers, i. e., exer-

than eighteen powers, however; some of the clauses convey more than one. The section which contains the enumeration of these powers is the longest single section in the constitution and also

cisable by both federal and state governments; Segment D, powers prohibited to the nation; and Segment E, powers forbidden to the states. The following are the most important powers that would be placed within the aforementioned circles and segments:

National Powers	Concurrent Powers	Prohibitions upon the Nation	Prohibitions upon the States	State Powers
To conduct foreign affairs. To raise and support armies. To maintain a navy. To regulate foreign and interstate commerce. To coin money. To establish a postal service. To grant patents and copyrights. To admit new states.	To tax. To borrow money. To charter banks and other corporations. To establish and maintain courts.	To abridge freedom of worship or of the press or of assembly or of petition. To deny any of the other privileges enumerated in the Bill of Rights (see Amendments I–X). To permit slavery in any territory within the national jurisdiction. To abridge the suffrage of citizens on account of sex. To give preference to one state over another in matters of commerce.	To keep troops or ships of war in time of peace. To enter into any treaty. To coin money or issue bills of credit. To pass any law impairing the obligation of contracts. To lay any tax or duty on imports. To abridge the privileges or immunities of citizens of the United States, or deprive them of life, liberty or property without due process of law or deny to persons within their jurisdiction the equal protection of the laws. To abridge the voting rights of citizens on account of race, color, previous condition of servitude, or sex.	To make and enforce the ordinary civil and criminal laws. To establish and control local government. To conduct elections. To regulate commerce and industry within the state. To protect the life, health, and morals of the people (the "police power").
		To pass any bill of attainder or *ex post facto* law. To grant letters of nobility. To levy duties on exports.		

the most important.[1] It furnishes the national government with its motive power, and indeed without this particular section Congress would be a body of very little consequence. This section forms the engine of the whole national mechanism.

How these powers may be classified.

Taken as a whole the legislative powers granted to Congress in these eighteen clauses of the constitution may be grouped under eight heads:

1. *Financial*, the power to levy taxes, to vote appropriations, and to borrow money.

2. *Commercial*, the power to regulate foreign and interstate commerce.

3. *Military*, the power to declare war, to raise and support armies, to provide for the organization, arming, and calling forth of the militia, and the power to maintain a navy.

4. *Monetary*, the power to coin money, to regulate the value thereof, and to protect the currency against counterfeiting.

5. *Postal*, the power to establish post offices and post roads.

6. *Judicial*, the power to establish inferior courts and to determine the composition and appellate jurisdiction of the Supreme Court.

7. *Miscellaneous*, including powers in relation to naturalization, bankruptcy, patents, copyrights, and to the government of the national capital.

8. *Supplementary*, the power to make all laws which may be found "necessary and proper for carrying into execution the foregoing powers."

Not all of these powers are of equal scope and importance. The first three categories—financial, commercial, and military—are of greater significance than all the others put together.[2]

4. Powers which remain with the states.

Naturally enough, no enumeration of powers retained by the states is made in the constitution. There was no need to do it; the states merely retained all that they did not give away. When an individual gives a deed of certain properties he does not think it necessary to accompany this grant with a list of all the properties that he retains. So powers not conveyed by the constitution to Congress, and not prohibited to the states, are state powers. The residuum which remains with the states is very large, including as it does nearly the whole field of civil and criminal law, the charter-

[1] Article I, Section 8.

[2] They are dealt with in Chapters XX–XXV of this book.

ing of corporations, the supervision of local government, the maintenance of order, the control of education, and the general administration of nearly all the things which touch the daily life of the people.

Administrative work of Congress.

Congress enacts laws within the scope of its eighteen powers. But it is also, in a very real sense, an administrative body, for it controls and directs the whole work of administering and enforcing its own laws. Congress provides the money without which the laws could not be executed or justice administered. It determines the pay of everybody in the service of the federal government. Hence a great deal of what Congress does is not lawmaking in the layman's sense of the term. When Congress makes an appropriation of money—to buy land and build a post office building, for example, the appropriation is made in the form of a law, but the action is to all intents a business deal and the ordinary citizen looks upon it as such. Probably three fourths of the national "laws" are simply the outer garments of administrative action. Congress thus supplies the motive power that runs the government. It controls the purse strings and thereby controls the mainspring of governmental authority. For without money there is little that any government can do.

Its supervisory work.

Likewise the Congress of the United States is a supervising, inspecting, scrutinizing, investigating body. It has a right to know, before voting more money this year, how last year's money was spent. It has a right to know, before voting money for new projects, whether there is need of the expenditure. To this end it receives all manner of reports, it calls for data, imposes restrictions, makes rules, and exercises supervisory functions on a huge scale. It may investigate anybody or anything at any time. When it does so it becomes vested with many of the functions, and most of the authority, of a court. During the past few years one committee has gone to Samoa to see how the government was getting on down there; another travelled all over the United States investigating Communist propaganda, a third moved from state to state trying to find out how much money the candidates for senatorial nominations were spending, while still others have probed into receiverships in bankruptcy, income tax evasions, public utility rates, and half a dozen other problems.

Summary.

Surveying the general powers of Congress, therefore, one might say that they are legislative, administrative, supervisory, and

investigative—with their importance in the descending order named. We say that Congress is a lawmaking body because that is its most important function; but it is by no means the only one. If Congress did nothing but make the laws, in the strict sense of the term, it could do its work in a few weeks every year. But it sits for several months because there are countless other things to do. Congress, not the President, is the basis on which the American system of national government rests, although few citizens realize it. For although Congress may exalt the President to a high pinnacle of authority by giving him a wide range of discretion within the bounds of law, it can always take away from him what it has given.

The encroachment on "states' rights."

The powers of Congress have been growing ever since its first session, not steadily, but by fits and starts. Many people have deplored this relentless march of federal centralization. They point out that as the powers of Congress expand, those of the states must contract. This is true, but the expansion of federal authority has been the inevitable concomitance of growth in the size and complexity of the country's political and economic problems. Problems which used to be local have become national. Commerce and communication, industry and investment—they have expanded to a point where they require national regulation as the only kind of regulation which can hope to prove effective. The country, moreover, has grown more nationally minded. The dread of a strong central government and the old regional suspicions have been passing away. People are more tolerant of federal intervention than they used to be. The United States have become united.

Some dangers involved.

But there are dangers in this tendency to look towards Washington for a solution of all the nation's problems. Too much centralization in the body politic, as France has discovered, may lead to a paralysis of the extremities. Moreover, there is such a thing as overburdening a government and breaking it down. No centralized administration, howsoever efficient, can hope to supply the entire governmental requirements of a hundred and twenty-five million people in the twentieth century. It must perforce leave much to local self-determination. The question is how much. As little as it can? Or as much as the states and municipalities show themselves competent to do? That is an issue on which opinions will continue to differ.

Congress, in the exercise of its powers, enacts too many laws. So do the state legislatures. There are said to be about two million laws and ordinances at present effective in the United States, or supposed to be effective. This is a mere guess, however, for nobody has ever counted them all. But even if you cut the figure in half it is ten times as many laws as are actually enforced. The enacting, revising, and amending of laws has become one of our great national industries. There is no depression, no unemployment, in this field of activity. When industry lags, the laws increase. Statutes fly from the forty-nine legislative capitals in the United States like sparks from so many anvils. Our legislators seem to have forgotten the beatitude that it is more blessed to repeal than to enact. Let us hope that they are not exemplifying the maxim which Machiavelli quotes from Tacitus: "The worse the state, the more abundant its laws."

The deluge of laws.

Laws beget laws. Give a statute time and it will have its own progeny. The increase is like that of microörganisms, by geometrical progression. The Fathers of the Republic foresaw the dangers of over-legislation and desired to guard against it.

A warning from James Madison.

> "It will be of little avail to the people," wrote one of them in the *Federalist*, "that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow."

We have long since passed this stage. Think of the New York policeman who carries in his pocket a list of the several thousand ordinances which he is expected to enforce. He is merely the sauntering symbol of a great city's legal helplessness. Our laws are too voluminous to be read, too incoherent to be understood, and often too absurd to be enforced. This is particularly true of the host of regulatory statutes which control the way in which private business can be carried on. The situation points to the greatest obsession of the American people, namely, a faith in the remedial potency of legislation. Laws do not get a nation out of trouble; more often they draw a country farther into it. The incessant passing, amending, and repealing of legislation, often at the behest of shot-gun economists, create an atmosphere of uncertainty. This develops into bewilderment until a situation develops in which "no man who knows what the law is today can

guess what it will be tomorrow." He can only be sure that tomorrow it will be something different.

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CHAPTER XX

FEDERAL TAXATION AND REVENUES

Vectigalia nervi sunt reipublicae.—Taxes are the sinews of the commonwealth.—*Cicero.*

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.—*Chief Justice Marshall* in McCulloch *v.* Maryland (1819).

The primate of all governmental powers.

Having surveyed the general powers of Congress and explained the basis upon which they rest, it is now appropriate to examine the more important of these powers, one by one, in order to see how they are exercised. First in importance among them is the power to tax. This is the one indispensable power that every effective government must have, for no government can function on voluntary contributions. It must have authority to compel contributions from its people, in other words, to impose taxes upon them.

Definition of a tax.

A tax may be defined as a burden or charge imposed by a legislative authority upon persons or property to raise money for public purposes. Taxation, accordingly, is simply the taking of private property for public use under conditions determined by law. The only difference between modern taxes and the predatory exactions of tyrannical times is that modern taxes are levied upon the people by action of their own representatives and in accordance with certain principles which aim to ensure a fair adjustment of the burden.

Essentials of a good tax.

Nearly one hundred and fifty years ago the greatest of early political economists, Adam Smith, laid down four rules or canons which ought to be observed in the levying of taxes, and these rules, despite great changes in both economic and political conditions, are recognized as sound at the present day. Smith's canons of taxation may be summarized as follows: that people should be

taxed according to their ability to pay; that taxes should be certain, not arbitrary; that they ought to be levied at the time and in the manner which is likely to be most convenient for the contributor to pay; and, finally, that taxes should be easy and economical to collect.[1] A good system of taxation should conform to these four rules.

Taxes are: 1. Compulsory.

Taxes differ from most other payments in two respects. *First*, they are compulsory. No one need pay interest, rent, wages, or prices unless he agrees to do so; but the payment of taxes is not the result of any bargain. Taxes are levied without reference to the initiative of the individuals upon whom they fall, except, of course, insofar as these individuals by their votes may have an influence in determining the general taxing policy of the government.

2. Levied without reference to services rendered.

Second, taxes are not adjusted to the amount of service rendered. The man who rides a hundred miles on a railroad pays twice as much as one who goes half that distance, because he gets twice as much for his money. But the man who pays a thousand dollars in taxes does not necessarily get twice as much in benefits from the government as the one who pays five hundred dollars.

The basis of taxation is not individual benefit.

Nearly all payments that we make are in proportion to the benefits which we receive. The one great exception is the payment of taxes. Those who pay very little in taxes, either directly or indirectly, sometimes receive a large return in the form of public service. Take, for example, the taxes that support the public schools. The fact that a wealthy man has no children, or prefers to send his children to a private school, does not relieve him of the obligation to pay his full share of what public education costs the community. On the other hand, a man whose contribution in taxes is very small may send a dozen children, one after another, through the public schools without any extra cost.

Why taxes cannot be adjusted to benefits.

It would not be possible to base taxation upon individual benefit because there is no way of knowing how much advantage each individual receives from the government's work. Do some individuals obtain more advantage than others from the maintenance of law and order, or do all derive alike? Who get the greater benefit from clean streets, those who drive their motor cars over them, or those whose dwellings front upon the highway? Taxes cannot be adjusted to service, but even if they could it would be unwise to do so. The general interest requires that everyone shall enjoy

[1] *The Wealth of Nations*, Book V, chap. ii, pt. ii.

the benefits of national defense, police protection, public education, and health measures, whether able to pay for them or not. So taxes are levied to pay for all these things by putting the heaviest burden on those who seem best able to bear it.

Classification of taxes:

Taxes are of various sorts and may be classified in several ways. According to their purpose, they may be designated as either fiscal or regulative. The former are levied for the sole purpose of securing revenue, while the latter are intended to bring about social or economic readjustments. Incidentally they produce revenue, but that is not their sole purpose. The general property tax is the best example of a purely fiscal tax, while a protective tariff is regulative in character, being designed to promote industry at home. Surtaxes on large incomes, and heavy taxes on inheritances, are also regulative in the sense that they aim to reduce swollen fortunes.[1] Taxation may, of course, be both fiscal and regulative, and most taxes are both to some extent.

1. According to purpose: fiscal and regulative.

2. According to incidence: direct and indirect.

Another classification of taxes is based upon their assumed incidence or final resting place. Direct taxes, such as taxes on land and poll taxes, are supposed to rest finally upon those who pay them in the first instance. But indirect taxes, such as customs duties, sales taxes, and excises upon liquor and tobacco, are laid upon the importer, manufacturer, or merchant with the expectation that they will be shifted to the shoulders of the ultimate consumer. These suppositions, however, are not always in accordance with the facts. Even direct taxes are occasionally shifted, while indirect taxes under some circumstances may remain where they are placed. For this reason the classification of all taxes into two categories, direct and indirect, is not a satisfactory one. But in the framing of the tax laws this distinction between direct and indirect taxes has had a considerable influence.

3. According to subject.

The chief taxes levied in the United States today by the nation, states, or municipalities, whether fiscal or regulative, direct or indirect, are (1) taxes on property, (2) taxes and surtaxes on the net incomes of individuals and corporations, (3) taxes on the capital stock of corporations, (4) taxes on inheritances, (5) duties on imports, (6) excises on liquors, tobacco, and on various other luxuries, (7) taxes on payrolls for social security, (8) business

[1] In 1935 President Franklin Roosevelt requested Congress to impose extremely heavy taxes on large incomes and on great inheritances in order to promote a better distribution of wealth. He made no reference to the revenue aspects of his proposal.

taxes, (9) stamp taxes on legal documents, (10) taxes on the sale of stock-exchange securities, (11) franchise taxes on public utilities, (12) sales taxes, (13) gasoline taxes, (14) severance taxes, and (15) poll taxes on persons. The national government is permitted to levy taxes in all these forms, but for more than sixty years it has not used either the first or the last, both of which (being direct taxes) have to be apportioned among the states according to their respective populations as the constitution requires.[1] In other words they have to be levied on population, not on wealth, which would make them most unpopular.

Limitations on the taxing power of Congress:

The constitution also restricts the taxing power of the national government in other ways. For example, it limits the purposes for which taxes may be imposed. Congress may not levy any tax except "to pay the debts and provide for the common defense and general welfare of the United States." That, to be sure, is not a stringent limitation because the term "general welfare" is such a broad one. This general welfare clause of the constitution, by the way, is commonly misunderstood. You will hear people say, from time to time, that Congress ought to do this or that under "the general welfare clause of the constitution." But this clause does not convey authority; it limits authority.[2] It does not empower Congress to do anything, but merely restricts its taxing power.[3]

1. Taxes must be levied for a public purpose.

The "general welfare" clause.

In various forms the question as to what is a "general welfare" purpose has been presented to the courts for interpretation. May taxes be imposed in order to pay bounties to growers of sugar beets or some other commodity which Congress desires to encourage? May Congress raise money by taxation to construct irrigation works in a single state, or help some city celebrate its centennial, or assist some section of the country that happens to have a crop failure? In such matters the courts have held that incidental private benefits or sectional advantages do not preclude the main purpose from being public. On the other hand the process-

[1] See also *below*, pp. 357–359.

[2] "It has been urged and echoed that power 'to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction." *The Federalist*, No. 41.

[3] For the arguments on the other side of this question see James F. Lawson, *The General Welfare Clause* (Washington, 1934).

ing taxes which were levied by Congress under the provisions of the agricultural adjustment act (1933) represented a radical stretching of the general welfare provision. For the act did not provide that these processing taxes should become merged with the general revenues, to be appropriated as Congress might determine, but definitely earmarked the proceeds for payments to those farmers who would agree to restrict production. The Supreme Court, in 1936, held the agricultural adjustment act unconstitutional because it did not represent a simple exercise of the power to tax and to spend for the general welfare but a scheme to control agricultural production through a plan of regulation which was voluntary in form but coercive in fact.[1] The constitution does not give Congress any right to regulate agriculture. Such jurisdiction belongs to the individual states under their residual powers.

2. Taxes must be uniform.

In the second place the constitution requires that all duties, imposts, and excises imposed by the authority of Congress shall be uniform throughout the United States. This does not mean, however, that all the states must contribute equally. Congress, in the exercise of its discretion, may adjust the burden of national taxation so that more will fall upon one area or section of the population than upon another, or more upon one class of people than on another. A tax on stock transfers is not void for want of uniformity, although such transactions take place in large cities and not in rural districts. Uniformity, within the meaning of the constitution, means that the tax must bear with equal weight wherever the subject of the tax is found. For example, a tax upon alien immigrants has been held to be uniform despite the fact that more than ninety-five per cent of it is collected at the port of New York. On the other hand a tax would not be uniform if it should make discriminations between the same things in different parts of the country; for example, if levied upon inheritances at a ten-per-cent rate in some states and at a twenty-per-cent rate in others. But it may be levied at different rates on inheritances of different size. The requirement of uniformity is geographical and does not prevent the imposition of progressive or graduated tax rates on inheritances, incomes, or profits.

Equality among ports of entry.

The rule relating to geographical uniformity is reinforced by another clause of the constitution which provides that no preference shall be given by any regulation of commerce or revenue to

[1] See *above*, p. 254, and *below*, pp. 447–448.

the ports of one state over those of another. This requires that customs duties on any class of commodities shall be levied at the same rate at every port of entry. Not only this, but the methods of determining valuations for duty must be the same.

3. No tax may be laid on exports.

A third limitation upon the taxing powers of Congress relates to exports and to internal tariffs. "No tax or duty," declares the constitution, "shall be laid upon articles exported from any state." This does not simply mean, as the words seem to imply, articles exported from one state to another state of the Union. It includes articles exported from any state of the Union to a foreign country.[1] Hence Congress is prohibited from taxing exports from the United States to foreign territories. It may tax imports only. The restriction upon the states is even more rigid, since a state cannot, without the consent of Congress, impose taxes upon either imports or exports under any circumstances whatever.[2]

Does this include the insular possessions?

In this connection the unincorporated insular possessions of the United States, Puerto Rico and the Philippines, have been held to be neither states nor foreign territory, hence trade between the United States and these islands may be subjected to tariff duties by Congress. Likewise the requirement that all taxes shall be uniform throughout the United States does not apply to them. As for Hawaii and Alaska, on the other hand, they have been held to be incorporated territories and hence come under the same rule as the states with respect to tariffs and uniformity.[3]

Reason for this rule.

The prohibition of any tax upon exports was one of the compromises of the constitution. It was a concession to the southern states, which in 1787 were large exporters of rice, tobacco, and other agricultural staples. The current economic notion of the day was that export duties always fell upon the exporter, while duties on imports fell upon the consumer. Hence the southern delegates were firmly opposed to giving Congress any right to impose export duties which would fall wholly upon the planters, and in the end they had their way. In some respects, however, the restriction has proved unfortunate. It has deprived Congress

[1] American Steel *v.* Speed, 192 U. S. 500 (1904).

[2] "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Article I, Section 10, par. 2.

[3] See *below*, pp. 492–493.

of a means whereby the depletion of natural resources might have been slackened. Exports of timber amounting to many millions per year have gone forth untaxed. It should be noted, however, that the prohibition of taxes on exports does not restrain Congress from regulating export trade in any reasonable way otherwise than by taxing it. Nor does it exempt goods from the payment of ordinary internal taxes merely because they are being manufactured for export.

Its unfortunate influence.

As regards duties on imports, Congress has full power. It may levy import duties of any sort and at such rates as it may determine, provided of course that the rates are uniform at all American ports where the goods come in. This power to tax imports has been continuously used by Congress, as everyone knows, since the establishment of the Republic. In earlier days the main purpose of a tariff on imports was to get revenue and only incidentally to protect American industry. But in the course of time this order was reversed; the tariff became primarily an agency of protection and only in a secondary sense a means of providing the national government with revenue.[1]

No restriction on the power to tax imports.

A fourth constitutional limitation on the taxing power of Congress relates to the imposition of direct taxes. There is a common impression that the national government cannot tax real estate, but must leave this source of revenue to the states and municipalities. There is no basis for this impression. Congress has power to levy direct taxes whenever it sees fit, but the total amount of such direct taxation must be "apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." In other words, Congress must first fix a specific sum to be raised and then allot to each state its share according to its population,—not according to its wealth, income, or area. This is a provision of the original constitution, somewhat modified by the fourteenth amendment.[2]

4. Direct taxes must be apportioned.

But what are the "direct" taxes which must be apportioned among the several states? At the time the constitution was

[1] See also *below*, pp. 414–418.

[2] In 1813, 1815, and 1816 direct taxes were levied to defray the expenses of the war with England and were apportioned among the states. In 1861 a levy of twenty million dollars was similarly levied by Congress and apportioned, but the southern states refused to pay and Congress subsequently gave back to the other states the sums which they had contributed. Since 1861 no attempt to apportion direct taxes has been made by Congress.

What are "direct" taxes in this sense?

adopted it was taken for granted that the only direct taxes were poll taxes and taxes on land. Taxes of every other sort were regarded as indirect taxes. And only a few years after the constitution went into force the Supreme Court affirmed this idea in a decision which declared that a tax on carriages was not a direct tax; that poll taxes and taxes on land were the only forms of direct taxation; while all other taxes were included within the comprehensive phrase "imposts, duties, and excises." [1] Three of the four justices who heard the arguments in this case had been members of the constitutional convention. Congress later levied taxes upon bank circulation, on the receipts of insurance companies, and on inheritances; but it did not apportion them and the Supreme Court held that none of these was a direct tax or needed to be apportioned.[2]

Some examples of early taxes not held to be "direct" taxes.

The income tax controversy: its various stages.

Finally, in 1862, under the stress of heavy demands for war revenue, Congress proceeded to lay taxes on incomes without provision for apportioning the total amount among the states according to population. Then, for the first time, arose the question whether an income tax was a direct tax. After reviewing its attitude in previous cases, the Supreme Court decided that an income tax was not a direct tax, and once more declared categorically that poll taxes and taxes on real estate were the only direct taxes within the meaning of the constitution.[3] This decision, however, was not given for many years after the passage of this income tax law which meanwhile had been repealed by Congress.

1. The income tax law of the Civil War period.

2. The income tax law of 1894.

This ruling, unequivocal as it was, might have been assumed to settle the matter forever, but after thirty years it was again revived,—and this time it was answered in a different way. Congress in 1894 found itself once more in urgent need of money. At the urging of certain members from the agricultural states, who now held the balance of power, it passed a new income tax law imposing a levy of two per cent on all incomes above four thousand dollars from whatever source derived. This law was promptly attacked on the ground that it taxed the income from land, which was in effect to tax the land itself, and hence a direct tax. The Supreme Court, after two hearings, upheld this contention on the ground that a tax on the income from land is not distinguishable

[1] Hylton *v.* United States, 3 Dallas, 171 (1796).

[2] Veazie Bank *v.* Fenno, 8 Wallace, 533 (1869), and Scholey *v.* Rew, 23 Wallace, 331 (1874).

[3] Springer *v.* United States, 102 U. S. 586 (1881).

from a tax on the land itself, the latter being admittedly a direct tax.[1] Like a tax on land, therefore, it ought to have been apportioned and the law of 1894 was held to be unconstitutional for not having done this. Thus, by a close decision, in which four out of nine justices dissented, the court reversed the ruling which it had made on the law of 1862.[2]

Its unconstitutionality.

This decision was widely unpopular and aroused a storm of disapproval. The Supreme Court was berated in the agricultural regions as an ally of the moneyed interests. A movement was started to remedy the situation by a constitutional amendment but not until 1913 was this agitation successful. In that year a sufficient number of the states gave their assent to the sixteenth amendment, which provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the states and without regard to any census or enumeration." Shortly after the adoption of the sixteenth amendment a new federal tax upon incomes was imposed, and this tax, which is now collected directly by the federal authorities, brings in a considerable share of the nation's income. It should be pointed out, however, that this amendment does not relieve any direct taxes, other than income taxes, from the necessity of apportionment. A tax on land or buildings, if Congress should ever again decide to levy such a tax, would still be subject to the original requirement.

3. The sixteenth amendment (1913).

The power of Congress to levy upon incomes, without apportionment, is now beyond question; but this does not mean that no income tax law can henceforth be held unconstitutional. It may be attacked on other grounds. The constitution provides, for example, that the salaries of judges "shall not be diminished during their continuance in office" and gives a somewhat similar protection to the salary of the President. Does the sixteenth amendment, in permitting Congress to tax "incomes from whatever source derived" overrule this earlier provision? It does not, for the Supreme Court has held that a tax on the income of a federal judge is, in effect, a diminution of his salary and hence not permissible.[3] In other words the court has taken the ground

4. The present income tax law.

[1] Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429; 158 U. S. 601 (1895).

[2] A majority of the justices also held the income tax law unconstitutional on other grounds as well, e. g., because it taxed the income from state and municipal bonds. For a discussion of this question see *below*, p. 361.

[3] Evans *v.* Gore, 253 U. S. 245 (1920), and Miles *v.* Graham, 268 U. S. 501 (1925).

that the sixteenth amendment does not give Congress power to tax anybody or anything that it could not tax prior to 1913, but merely abolished the necessity of apportioning income taxes.

Implied limitations.

All of the foregoing limitations as to the purpose and methods of national taxation are expressly laid down in the constitution. But in addition there is an implied limitation arising out of the very nature of the federal union, and one that is deemed essential to assure the continued free working of the state governments. If the states are to be secure in the full enjoyment of their reserved powers, Congress must not be permitted to clog their governmental machinery by taxing it to a standstill. For let it once be admitted that Congress may tax the mechanism through which the state performs its functions and the supremacy of Congress over the states would soon become established. If Congress, for example, did not like the practice of electing state judges it could then put a heavy tax upon the salaries of all such officials and thus get rid of them—just as it eliminated all paper money issued by state banks when it set out to do this by taxation.

May Congress tax the instrumentalities of a state?

The implications of the decision in McCulloch *v.* Maryland.

Over one hundred years ago, however, when a case in point came before it, the Supreme Court ruled that no state could tax the agencies of federal administration, such as the post offices, the custom houses, the notes of national banks, or the salaries of federal officers.[1] This decision was based upon the principle that the various states, if given authority to tax the federal mechanism, would have power to stop its wheels entirely. But logic requires that such a principle must work both ways, and the courts have held, on a number of occasions, that Congress cannot tax the salaries of state or municipal officers, or the income from state or municipal bonds.[2] It is for this reason that a teacher in a state university pays no federal income tax on his salary (for he is technically a state official) while teachers in endowed educational institutions are subject to the tax, being rated as private employees. If, however, a state or municipality engages in some money-making enterprise, such as operating a liquor dispensary, the courts have ruled that this may be taxed by the federal government like any similar form of private business.[3] And those

[1] See *below*, pp. 393–395.

[2] For example, in Collector *v.* Day, 11 Wallace, 113 (1871) and in Pollock *v.* Farmers Loan and Trust Co., 157 U. S. 429 (1894) and 158 U. S. 601 (1895).

[3] South Carolina *v.* United States, 199 U. S. 437 (1905).

who derive an income from public works done under contracts with states or municipalities are not entitled to any exemption.[1]

Some results of the tax-exemption doctrine.

The principle that the states must not tax the income which is derived from bonds of the national government (including bonds of the home owners' loan corporation, the farm loan banks, and other federal agencies), together with the converse doctrine that Congress must not tax the income derived from state or municipal bonds—these two supplementary propositions have created an embarrassing situation with respect to the raising of public revenues. Many billion dollars worth of tax-free bonds are available to investors. This means, as a practical matter, that the rate of taxes and surtaxes on individual incomes cannot be raised above a certain point lest the owners transfer their holdings into tax-exempt securities to escape the high rates. Suppose, for example, that a man has an income of $100,000 per annum derived from industrial stocks and bonds which yield him an average of five per cent. If the government were to place taxes and surtaxes on his income at the rate of forty per cent he would find it profitable to shift his investments into tax-exempt bonds even if their yield were as low as three-and-a-half per cent. A serious evil also arises from the fact that tax-exempt bonds are so strongly favored by investors that they sell readily at low rates of interest. This encourages public borrowing, even wasteful public borrowing. The situation ought to be corrected by a constitutional amendment stipulating that the income from all government bonds hereafter issued shall be subject to taxation like the income from bonds of any private corporation.

Popular errors:

1. Concerning "double" taxation.

Two widely held impressions concerning the nation's power to tax have no basis in law. The first is the idea that "double" taxation is unconstitutional, in other words, that the same thing must not be taxed twice. There is nothing in the Constitution of the United States to prohibit double taxation; the same income may be taxed by both national and state governments. So may the same inheritance. An inheritance, indeed, may be taxed three or four times—by the federal government, by the state in which the decedent lived, by the state in which the heirs live, and by the state in which the inherited property is located. Gasoline taxes are levied by both the national and state governments.

[1] Metcalf *v.* Mitchell, 269 U. S. 514 (1926).

Double and triple taxation may be unjust or unwise; but it is not unconstitutional and never has been.

2. Concerning taxation and representation.

The other widespread but erroneous idea is that there must be "no taxation without representation." This may be good political philosophy, but it has no validity as a legal principle. The nation and the states may tax people without giving them representation; there is nothing in the constitution that forbids them to do so. The people of the District of Columbia, for example, are subject to taxation like those in the rest of the country, yet they elect no mayor, councilmen, or other local officers, they are not represented in either House of Congress, and they have no voice in the election of the President. Some years ago the Supreme Court, in a controversy which involved this question, unanimously decided that Congress has an undoubted right to tax without granting representation.[1]

How Congress has exercised its taxing powers.

These, then, are the taxing powers of Congress as set forth in the constitution and interpreted by the courts. How have these powers been exercised? It was assumed by the framers of the constitution that Congress would frequently impose direct taxes and apportion them among the states, but this source of federal revenue has proved of negligible importance during the past hundred years. The national government has depended at all times for the bulk of its revenue upon indirect taxes, particularly upon customs duties, excises, and more recently upon corporation taxes, individual income taxes, inheritance taxes, and a variety of miscellaneous taxes. Until after the beginning of the twentieth century the revenues from import duties and excises formed the most important factor in the government's income, but after 1909 taxes on the capital stock of corporations began to figure in the returns, and following 1913 large increments of revenue were obtained from income taxes on individuals. In 1916, the year before the United States entered the war, the national revenue from taxation was about seven hundred millions, of which the customs duties contributed considerably less than one half.

Direct taxes.

Excises of all sorts.

The war taxes.

But in 1917, when the United States declared war upon the German government, the certainty of huge military expenditures necessitated a general revision of the tax laws. It was not deemed to be expedient that all the funds needed for the war-effort should be raised by borrowing. Hence Congress, by a series of war revenue

[1] Heald *v.* The District of Columbia, 259 U. S. 114 (1922).

measures, not only extended and increased the existing taxes but resorted to new forms of federal taxation as well. The excises on tobacco were increased, while many new excises were imposed—for example, upon telegrams, railroad and Pullman tickets, jewelry, soft drinks, automobile sales, certain legal papers, and so forth. The rates of taxation, both upon corporations and upon the net incomes of individuals, were much increased. A tax upon excess profits, that is, upon all business profits above a certain point, was levied for the first time in American history. By these various tax measures the nation's normal income was several times multiplied.

Some of them continue.

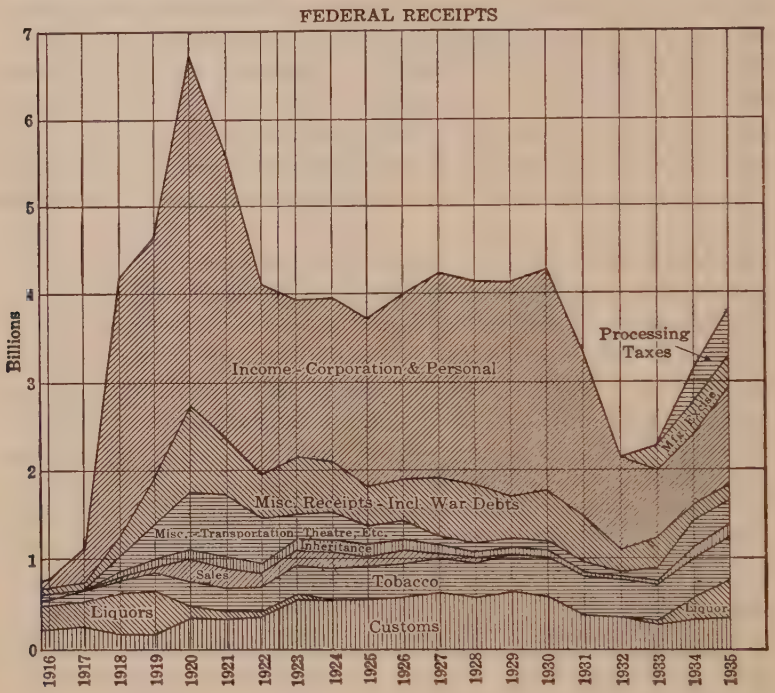
After the war came to an end some of these taxes (notably the excess profits tax) were abolished, but others (such as the tax on club dues) have been retained. The rates levied upon the net incomes of individuals were also lowered but presently were raised again. War greatly expands a nation's tax bill, and when the war is over it never contracts to its former dimensions. There is interest on the war debt to be paid, and pensions, and a larger salary roll, for thousands of those who are appointed to government positions during the war manage to hold on after it is over. The same is true of a peace-time emergency such as an industrial depression. The total outlay is not to be measured by what it costs while it lasts.

Present-day federal taxes.

Today the national government levies, for its ordinary budget, taxes to the total of nearly four billion dollars per year, or more than thirty dollars per capita of population. Customs duties bring in less than ten per cent of this total. Excise taxes on alcoholic liquors, tobacco, cigars, cigarettes, playing cards, cameras, firearms, gasoline, theater tickets, club dues, Pullman car facilities, stock transfers, and so on yield a considerably larger fraction. Taxes and surtaxes on the net incomes of individuals and corporations are also a lucrative item on the revenue side of the national budget. The estates tax or inheritance tax produces a good deal, but more in some years than others, depending on the number of large estates which become taxable through the decease of their owners. Mention should also be made of the excises which are levied on certain products in process of manufacture, as a means of promoting soil conservation through curtailment of agricultural production.[1] Finally the national treasury receives a considerable

[1] See *below*, p. 448.

amount of miscellaneous revenue in the way of fees, fines, penalties, profits on the coinage, money received from the sale or lease of public lands, and so on.



The widening field of federal taxation.

The great widening in the area of federal taxation which has taken place during recent years has brought it to pass that both the nation and the states are deriving a good deal of their revenue from the same sources. The taxing powers of the states clearly overlap those of Congress, for the states are at liberty to tax practically anything except imports, exports, the instrumentalities of interstate commerce, and the agencies of the federal government. Many states now have inheritance taxes and taxes upon the earnings of corporations, while several have imposed personal income taxes as well. Some of them have sales taxes which cover commodities on which a federal excise tax has already been imposed. In fixing their respective rates of taxation, moreover, the nation and the states pay very little heed to one another. Each regards its own necessities. This is unfortunate from the taxpayer's point of view because the cumulative burden falls on him. The taxation

of property, incomes, inheritances, and sales ought to be planned as a whole and not left as a hostage to the exigencies of competing governments. Competition for revenues between different taxing authorities, each of which endeavors to gather all it can from the same sources, can never be made the basis of sound public financing.

Federal taxation as a means of social and economic readjustment.

But the extension of federal taxation has not been wholly due to the need for more revenue. Some federal taxes, such as the estates tax, are designed to effect a wider distribution of the nation's wealth by making more difficult the accumulation of large fortunes through inheritance. The federal income tax, with a rate which becomes higher as the size of the income increases, is also assumed to render a social service by preventing the concentration of wealth in the hands of a few. The levy on processed goods was designed to make the consumer of agricultural products pay a higher price for what he buys and give the farmer a higher price for what he sells. It yielded no net return to the national treasury. Taxation, in a word, is becoming not only a means of raising money for public use, but of compelling such economic reconstruction as Congress thinks desirable for American society as a whole.

The future of taxation.

The future of national taxation ought to have a word because certain features of congressional policy in this field are now becoming clear. It is unlikely that tariff duties will ever again contribute so large a proportion to the total revenue as they did during the years before the World War. Excises will undoubtedly be continued, especially upon luxuries. If the signs are not misleading, we may look for the continuance of heavy taxes on large individual incomes and on the net profits of corporations since such taxes are popular with the people who think that they do not have to pay them. The imposition of a federal sales tax has often been suggested and such a tax would undoubtedly yield a large sum even if it were levied at a very low rate. The objection to a sales tax is chiefly political. It is too direct, too nearly universal, too visible. What the voters like is a tax which they pay without realizing it.

The need for public education in tax matters.

This prompts the remark that on no subject is there so much opacity in the public mind as on questions of taxation. On none is there so much muddled thinking. Millions of Americans take it for granted that a tax stays where you put it, and hence that

when you tax property the money comes out of the owner's pocket. In other words, most people give little heed to the ultimate "incidence" or final resting place of a tax. They imagine that when you lay taxes upon railroads, the owners of the railroads pay it out of their dividends, and that when you tax the income from mortgages it is only the money lenders who have to worry. When you tax an apartment house, most of the tenants imagine that the landlord pays it,—and they chuckle when the tax rate goes up, because they think it serves him right.

The incidence of a tax.

Now nothing could be farther from sound economics than this idea that all taxes stay where they are put. The railroad owners and bankers and landlords are for the most part only the middlemen who pay the taxes in the first instance and then collect the money, every dollar and more, from passengers, shippers, borrowers, tenants, and customers. Nearly all taxes, of whatever sort, percolate into the cost of living. There is almost no such thing as a non-taxpayer—at any rate not outside the prisons and poorhouses. Everybody who smokes cigarettes, for example, pays taxes. What he smokes indeed is mainly taxes, not cigarettes, because more than half the cost of this commodity is usually made up of excises levied by Uncle Sam and sales taxes imposed by the state.

A great American delusion.

A government, of itself, produces no income. It earns no money, saves no money, invests none, accumulates no capital, makes no profits, and pays no dividends. A government merely lives off the earnings of the country, the whole country. It simply takes a part of what its citizens have earned and gives them in return such services as it thinks they ought to have. Hence it is folly to let ourselves be deluded into imagining that taxes come only from the well-to-do and place no burden upon the farmer or the worker. It is supreme folly because nine tenths of our extravagance in government is attributable to the popular delusion that the majority of the people do not have to pay for it. Who pays the taxes on gasoline, on theater tickets, on beer and wine? Doesn't an excise on processed wheat go into the price of bread, and the income tax on dentists' earnings into the cost of dentistry? Who is there to pay the taxes that are levied on the earnings of industrial corporations except the people who buy and consume the products? These ought to be simple questions, but if the average voter would ask and answer them for himself there

would be a good deal more widespread interest in governmental economy.

Collecting the revenue.

The work of collecting the national revenue is in the hands of the secretary of the treasury, but is chiefly performed by two agencies in his department, namely, by the division of customs and the internal revenue service. For the collection of duties upon imports the country is divided into customs districts, each with a main port of entry in charge of a collector or deputy collector of customs. For the collection of internal revenue taxes the country is divided into a larger number of similar areas, each also in charge of a collector. The work of these collectors of internal revenue includes not only the levy of the regular excises, but the collection of the corporation and income taxes as well. The assessments from which corporation and individual income taxes are levied depend, in the first instance, upon sworn declarations which must be filed by every corporation, partnership, or individual who is liable to taxation. Incomes of business corporations and of individuals below a designated sum are exempt. All collections are turned into the general treasury of the United States. Then they are either kept in the treasury vaults at Washington or deposited in banks (especially the federal reserve banks) until the money is needed. In order to qualify as a depository for government funds a bank must fulfill certain conditions which are laid down by law.

Accounts and audits.

The accounts of every officer who has to do with the collection of the revenue are regularly audited by officials of the general accounting office, which was established by the provisions of the budget and accounting act of 1921 under the headship of a comptroller-general. This official is appointed by the President, with the approval of the Senate, for a fifteen-year term. He is irremovable except by impeachment or by a joint resolution passed by both Houses of Congress. The general accounting office is independent of all departments and responsible to the President alone, thus ensuring impartiality in the conduct of its work. This work of auditing, it need scarcely be added, is of huge dimensions because almost every bureau or office in all departments of the government is receiving money from some source—in fees, charges for patents, copyrights, steamboat licenses, fines in the federal courts, proceeds from the sale of property, or confiscated merchandise, and so on. The general accounting office, as will be

pointed out later, is also entrusted with the work of auditing all payments made out of the national treasury.

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CHAPTER XXI

NATIONAL EXPENDITURES AND THE NATIONAL DEBT

It is impossible for the king to have things done as cheap as other men.—*Samuel Pepys.*

A scrupulous care for finance underlies the foundation, not merely of an honest character in individuals, but of honest and efficient government. A disregard of it has scattered distress and want, caused rebellions, and led to the collapse of great nations.—*The Federalist.*

The rising cost of government.

Twenty-five years ago it cost only six or seven hundred million dollars to run the nation's government for twelve months; today the ordinary expenditures (excluding emergency outlays) amount to about three billions. Counting emergency expenditures, the total in 1935 was more than seven billions. The normal cost of American national government has quadrupled since 1910. Neither the World War nor the great depression is responsible for all of this increase. Interest on the war debt and soldiers' pensions account for only a part of it. What has caused the rest?

The reasons for it:

1. The law of increasing costs.

The answer is twofold. First is the fact that all government is conducted under the law of increasing costs per capita. The more populous and more civilized a country becomes, the larger is the cost of government for every unit in its population. National greatness is an expensive luxury. It might be thought, offhand, that when a country does things on a large scale it would be able to do them more cheaply; but such is never the case. An army of ten thousand men costs so much per man. Will an army of a hundred thousand men cost less or more than ten times as much? It will cost more than ten times as much. Multiply its size by ten once more, and give the country an army of a million men. The cost will increase far more than tenfold, yes, more than twentyfold. The bigger your army the more varied and costly its technical services. The same is true of the navy. In a varying degree it seems to be true of every other branch of governmental activity—even the post office. Samuel Pepys was right when he remarked, nearly three hundred years ago, that the king's service was more expensive than that of other men. It has been so in all ages, in monarchies and

republics alike. A government is the most expensive of all mechanisms for getting things done.

How public services expand.

Every year the national government is being called to expand old services and to render new ones—in the field of national defense, agriculture, industry, commerce, public health, labor, education, and social welfare. A new service may involve such a small outlay at the start that Congress dislikes to deny the request. Then it begins to grow like a sycamore tree, sending out its branches in all directions, and presently its roots must have more sustenance. The initial appropriation of a million or two becomes twenty, fifty, or even a hundred millions within a few years. There are few things more voracious than a new governmental enterprise.

2. The economic emergency.

A second reason for the very great increase in national expenditures is the economic emergency which began in 1929. In previous economic depressions the national government did not assume the chief responsibility for the relief of distress and the restoration of normal conditions. It left a large share of this responsibility to the states and the local authorities as well as to private charitable organizations. But in 1933, when the emergency became critical, a new course was charted by the federal authorities. Through various national agencies and boards the national government began pouring out unprecedented sums of money for emergency relief. In addition it embarked on a huge program of public works as a means of diminishing unemployment. Nearly five billion dollars were appropriated for this purpose in a single measure. Such huge expenditures could not be defrayed from the normal revenues of the government and consequently had to be liquidated by borrowing. The result was a series of unbalanced budgets and a large increase in the national debt.

The chief items in the national budget.

Apart from these emergency outlays, what are the chief items of national expenditure at the present time? Interest on the national debt amounts to a large sum each year, and to this must be added the money set aside for ultimately retiring certain portions of the debt. A billion or more goes for these purposes. The army and navy, put together, cost another half billion or more. To this must

War and its aftermath.

be added an approximately equal amount for military and naval pensions, together with hospitalization, insurance, and the other activities of the veterans' bureau. So here are two billion dollars chargeable to war, preparations for war, and the aftermath of war.

One of the impressive lessons of history is that wars are never financed on the "pay as you enter" plan.

The peaceful activities.

In the ordinary expenditures of the national government, therefore, less than thirty-five per cent is now being devoted to strictly civil purposes. The largest single item is represented by the cost of the work done by the department of agriculture; the rest goes for the expenses of the executive departments and the courts, the erection and maintenance of public buildings, federal grants-in-aid to the states for roadbuilding, education, and so on, subsidies to agriculture, the maintenance of the foreign service, the expenses of Congress, the postal deficit, as well as for defraying the cost of governmental regulation, and a host of miscellaneous services. The maintenance of Congress costs only twelve or thirteen cents per head of population; the work of the department of labor costs only about five cents per capita. But the amount disbursed to veterans for pensions, hospitalization, and so forth, is figured at about five dollars per unit of population.

The Budget System—Past and Present

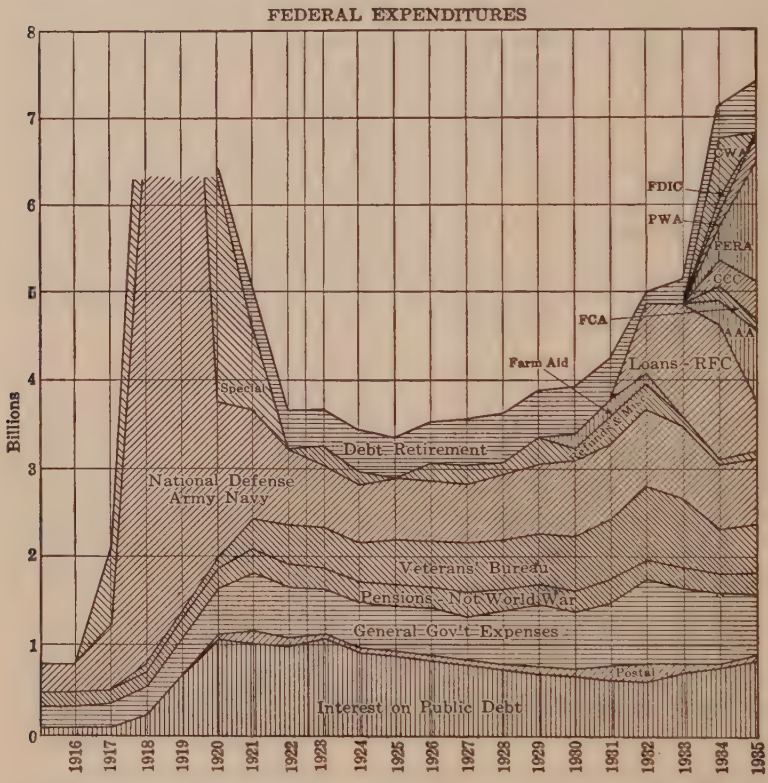
How appropriations are authorized.

How is the allotment of money to various governmental purposes determined each year? It has long been a principle of sound administration that no public money shall be spent except after authorization by the representatives of the people. Accordingly it is provided in the Constitution of the United States that "no money shall be drawn from the treasury but in consequence of appropriations made by law." The first essential step in all national expenditure is, therefore, that Congress shall make an appropriation in the form of a law. These appropriation laws are often elaborate affairs with thousands of items. In printed form they may fill as many as a hundred pages in the statutes-at-large. Before an appropriation bill is submitted to Congress, however, there are some preliminary steps which should be indicated.

The estimates

Most of the functions of national government (such as the maintenance of the army, the navy, public works, pensions, the administration of justice, federal grants to the states, emergency relief, and so on) are in the jurisdiction of some executive agency such as a department, board, bureau, or office. Each of these agencies must first make an estimate of the amount of money that it will require for the ensuing fiscal year. Such estimates are not mere guesswork but are worked out with a good deal of care by

taking the previous year's expenditures as a basis. Prior to 1920 all the estimates were sent to the secretary of the treasury, who then turned them over to the Speaker of the House without any revision or comment. Along with these figures the treasury department likewise transmitted its own estimate of the probable revenue that would come in under the existing tax laws.



The old plan of considering them.

Then the Speaker distributed the estimates of expenditure to various committees, eight or nine of them—the committee on military affairs, on post offices, on agriculture and so forth, each getting the estimates in its own field. These various committees thereupon reviewed the figures and brought into the House various appropriation bills based upon their own conclusions as to what ought to be voted. But each of these committees did its work independently, without regard to the needs of other services or to the amount of revenue that would be available. No one of them knew

what the others were doing. One committee might be trying to economize while another was cutting loose with extravagance. Congressmen argued that the work of scrutinizing the estimates was too heavy for any single committee to perform, and hence that eight or nine specialized committees could do it better than one general committee on appropriations.

Its results

So the United States remained, until after 1920, the only great country without a unified budget system. Proposals to spend money came at every session from a multitude of sources. Each committee found itself beset by lobbyists as well as by department heads and bureau chiefs—all wanting increased appropriations. Every congressman clamored for something that would please the voters in his own district—a new post office building, a harbor improvement, a local weather bureau station—anything that would help his reputation as a go-getter among the home folks, even though it might involve the needless spending of public money. Everyone, to use the vernacular of the day, wanted to "dip his paws into the pork barrel." The waste involved in all this was enormous. Only a rich and prosperous nation could have endured it. But so long as a large amount of revenue kept coming in, chiefly from the proceeds of the protective tariff, it was hard to impress the country with the need for reforms which would promote economy.

How it broke down

The World War put a different face on things. During 1917–1919 the national expenditures went up so rapidly that some system of centralized control became more urgent than ever before. For many years a small group of congressmen had been advocating the establishment of a unified budget system such as existed in England; but their arguments did not count for much until the nation found its tax rates doubling and trebling at a stroke. Then the cry for "economy and efficiency" resounded from all corners of the land and Congress responded in 1920 with the passage of a budget bill which President Wilson vetoed because it contained one highly objectionable provision.[1] Next year, however, the measure was reënacted with this provision eliminated. It was signed by President Harding and is known as the budget and accounting act of 1921.[2]

[1] A provision excluding the President from all participation in the removal of a comptroller-general.

[2] W. F. Willoughby, *The National Budget System* (Baltimore, 1927). The text

The new budgeting agencies.

First of all, this act set up two new agencies of financial control, namely, the general accounting office and the bureau of the budget. To the first of these it gave the function of auditing the accounts of all the national services, as already explained.[1] But in addition it gave the comptroller-general, who is at the head of the general accounting office, the right to investigate all matters relating to revenues and expenditures. He has the power to withhold any payment which he deems not to be warranted by law, and has the right to make reports directly to the President or to Congress. The general accounting office has thus become an agency from which accurate information on all matters relating to national finance can be obtained by both the executive and legislative branches of the government.

The director of the budget.

The bureau of the budget is likewise an independent agency, although nominally in the treasury department. Its head, the director of the budget, is appointed for an indefinite term by the President (without confirmation by the Senate) and is responsible to him alone. He is, in fact, the President's personal adviser on all matters relating to national expenditure. So long as the director has the President's confidence he can virtually determine what items of expenditure shall be recommended to Congress and what ones shall not. Thus the director of the budget, rather than the secretary of the treasury, has become a modified copy of the English chancellor of the exchequer.

A budget defined.

What is a budget? It may be defined as a plan of public financing for the incoming year. This involves an itemized estimate of all revenues on the one hand and of all expenditures on the other. A properly constructed budget should be balanced, that is, the anticipated revenues should at least equal the anticipated expenditures and preferably should show a small surplus in order to be on the safe side. When estimated revenues are insufficient to cover the anticipated expenditures the budget is said to be unbalanced, for the outcome will be a deficit which has to be liquidated by borrowing. A succession of badly unbalanced budgets then results in a large increase of public indebtedness.

Balanced and unbalanced budgets.

The general procedure in making the national budget is now as follows: first, each department, as well as each independent bu-

of this act can be found in the appendix to W. F. Willoughby and Lindsay Rogers, *An Introduction to the Problem of Government* (revised edition, New York, 1921).

[1] *Above*, p. 367.

reau, board, commission, office, or service prepares a detailed statement of its financial needs for the ensuing fiscal year. These estimates, which are based upon the expenditures of the previous year and are made on standard forms, go to the bureau of the budget where they are assembled and put in shape for revision. The director of the budget thereupon goes over the figures, makes note of the various increases and confers with heads of departments or other officials concerning their reasons for asking more money. In case of disagreement on any important item the issue is usually referred to the President for decision, but under the law the director of the budget has the power to make whatever changes he deems advisable. Similarly the director of the budget obtains data from the treasury and prepares an itemized report showing the probable receipts for the fiscal year, including revenues from existing and proposed taxes.

Procedure under the new budget system:

1. The estimates.

When this work of revising and compiling is completed, the whole array of figures is combined into a ponderous document of several hundred pages which is thenceforth known as the budget. The President sends it to Congress with a recommendation that the various appropriations be granted. In so doing he may, and sometimes does, call attention to the more important increases or decreases, explaining the reasons therefor. Thus the executive branch of the government has now become almost fully vested with the initiative in planning the financial policy of the nation.[1]

2. The executive recommendations.

Then comes the next step. The House of Representatives receives the budget from the President. Without debate the document is referred to its committee on appropriations, which consists of thirty-five members.[2] This committee, in turn, refers the various groups of items to subcommittees for detailed study and public hearings. These subcommittees work upon the figures and, whenever necessary, call in the various executive officials to explain their respective needs and requests. Where large increases over the previous year are asked for, the officials have to justify them. Sometimes they are questioned in great detail. Anyone who desires to go on record as opposing any appropriation may also be heard. Then, when this study of the figures has been completed, appropriation bills are drafted by the several subcommittees and

3. Legislative action.

[1] For one exception see *below*, p. 377.

[2] Twenty-three are chosen from the majority party in the House, and twelve from the minority.

reported to the general committee on appropriations. The latter, after a further review, reports the various bills to the House.

In this way the House gets the whole story, all at once, and not piecemeal as was the case under the old system. It learns from an authoritative source just how much revenue the existing taxes are likely to produce, and how much of a deficit, if any, there will be in case the budget as recommended by the President is adopted. Congressmen are thus brought face to face with the fact that increases in the budget will throw it out of balance and that this must be offset by raising the taxes or by borrowing the money.

Supplementary and additional appropriations.

Not all the national expenditures for the year, of course, can be embodied in a single budget. In preparing their estimates, some things are always overlooked by the various departments no matter how careful they may try to be. No official, however capable or experienced, can foresee all his financial needs for twelve months in advance. Hence the various departments and services are permitted to file supplementary or deficiency estimates after the regular appropriations have been voted. But these belated requests for money also go to the bureau of the budget, and are sent by the President to the House, where they are similarly handled by its committee on appropriations. No appropriation bill can be reported to Congress except by this committee.

Proposals of expenditure originating in the House.

Nevertheless various proposals of legislation, some of which involve the expenditure of money, are introduced by individual congressmen at every session. For congressmen have jealously reserved their right to introduce bills and resolutions of every nature, whether involving expenditure or not. Such proposals of expenditure do not go to the bureau of the budget but are first sent to the specialized committees (e. g., foreign relations, post offices or interstate commerce) for consideration on their merits. If favorably reported by one of these committees the bill is then transmitted to the committee on appropriations for approval of the expenditure involved. A proposal to increase the membership of the interstate commerce commission, for example, would go first to the committee on interstate and foreign commerce. If favored by that committee it would then have to be reviewed by the committee on appropriations, inasmuch as an increased membership would involve a larger expenditure for salaries. The common practice of the committee on appropriations is to take a

number of individual proposals and combine them into a single appropriation bill.

Riders.

Sometimes an appropriation bill, in order to expedite its consideration by the House, is tacked to another measure as a "rider." For example, a bill to deepen the harbor in some favored congressman's district may be hitched to the appropriation for the war department, thus giving it momentum which it would not obtain by travelling through the House under its own steam. This habit of tacking rider-appropriations onto general bills is one of the practices which help to throw a well-organized budget out of balance. For the President cannot dislodge the rider without vetoing the whole bill to which it is attached.

The final stages in the House.

Upon being reported to the House by the committee on appropriations the regular appropriation bills are put through their required readings and discussed by the House in committee of the whole. The House has a right to insert, strike out, increase or decrease items at its discretion, but from the nature of things this right is not easy to exercise. A body of four hundred and thirty-five members cannot, as a practical matter, give detailed consideration to the long lists of figures contained in these measures. And in any event the dreary columns of digits do not afford much enlightenment or inspiration to debate. Few congressmen want to see appropriations reduced; on the other hand they realize that if they begin increasing them there is no place to stop. Consequently the bills usually go through without a great deal of change from the President's recommendations, although minor changes are frequently made and various conditions are sometimes attached to certain items. For example, an appropriation for the building of submarines may be restricted by adding the provision that they must be built in government navy yards.

Appropriation bills in the Senate.

Having passed the House the various appropriation bills go to the Senate, where they are also referred to a committee on appropriations, with the exception of the rivers and harbors improvement bill which is referred to the committee on commerce. Before these two committees anyone may appear and urge amendments, so heads of departments and others who have had their estimates reduced in the House sometimes renew their importunities before the Senate committees. Even members of the House of Representatives who have failed to impress their own colleagues with the merits of their requests for appropriations do not hesitate to

appear before the Senate committees and reiterate their arguments. But their efforts are not usually attended with much success.

Appropriation bills in conference.

When the bills are reported to the whole Senate a few further changes in individual amounts are sometimes made. Then the appropriations are sent back to the House for concurrence, and if the House does not agree to the Senate's changes they are referred to a committee of conference made up of selected senators and representatives. It is the function of this conference committee to adjust the items and get the appropriation bill into such shape that both the House and the Senate can agree on every word of it. Compromises are made here and there; the conferees report their agreements to their respective chambers, which finally pass the bill and send it to the President to be signed.

Influence of the President on appropriations.

When an appropriation bill has been passed by Congress the President has virtually no alternative but to accept it. He can veto the whole bill if he chooses to do so; but he cannot veto some individual items in it, leaving the rest to stand. To veto a whole appropriation bill, however, for the mere reason that certain items in it are objectionable, is a rather drastic step. It would leave some important branches of administration without any funds until a new bill could be put through its various stages, and Congress would probably adjourn before that could be done. Consequently the President, as a rule, registers his objections to the offensive items but signs the bill all the same. The result is that the veto power, so far as the spending of public money goes, is greatly weakened. This situation is embarrassing to the President and may be costly to the taxpayers. Public opinion holds the President responsible for all the items in any bill which he signs even though he may be strongly opposed to some of them.[1]

The coördinators.

The establishment of the national budget system was a long step forward. The bureau of the budget has saved the country a great many millions, particularly by its rigorous investigation of departmental expenses and its constant discovery of ways in which the taxpayer's money may be saved. Through various boards (such as the federal purchasing board and the general supply commission) it has effected numerous and important economies. There has also been appointed by the President a chief coördinator in Washington and under him nine area coördinators of supplies

[1] On the question whether the President ought to be given the power to veto individual items, see *above*, pp. 204–205.

in different parts of the country. Their business is to assist in bringing into harmony the methods used in the purchase and sale of supplies by the government offices and agencies throughout the country.[1]

How appropriations are made in other countries.

The foreign student of American government who reads the foregoing discussion will notice that two things stand out prominently: first, the marked difference between the budget system of the United States and that of other countries, and second, the considerable amount of power which the Senate exercises in connection with public expenditures. In England, in France, and indeed in every country having constitutional government except the United States and the Latin-American republics, there is a centralization of responsibility for all proposals to spend public money. In England no proposal to spend money can be considered by the House of Commons unless it comes from the crown, that is, unless it comes to the House with the endorsement of the cabinet.[2] In the United States, on the other hand, any head of a department, any senator, any representative, any citizen in fact, may obtain a hearing upon proposals to spend the nation's money.

Again, the powers of the United States Senate in budget matters are distinctive. In England the House of Lords cannot amend or reject a money bill. So far as the English budget is concerned the authority of the lower house is final. In France the Senate has technically the right to make changes in the budget but this it very rarely does. The United States Senate, by way of contrast, is constitutionally vested with exactly the same powers as the House of Representatives so far as the budget is concerned. By custom (though not by constitutional requirement) all appropriation bills originate in the House, but the Senate may amend at will and through its amending power may virtually originate new proposals of expenditure.

Value of the new American budget system.

While the passing of the budget and accounting act represented a meritorious step in the direction of fixing financial responsibility, the control of national expenditures in the United States is not yet so strict as it ought to be. The director of the budget has been

[1] Their functions are to inspect supplies in each governmental office, to keep in touch with governmental projects, to supervise the purchase of materials, to fix prices for the sale of surplus supplies and so on.

[2] Here is the rule (adopted more than two hundred years ago): "This House will receive no petition for any sum relating to the public service, or proceed upon any motion for a grant or charge upon the public revenue—unless recommended by the crown."

given the initiative, but by no means the sole initiative. Congress has not regarded the new budget system as having placed any limitations upon its own financial discretion. The result is that complete responsibility belongs neither to the executive nor to the legislative branch of the government; it is divided between the two. The President may pledge economy, but unless he obtains the coöperation of Congress he cannot redeem his pledge. From time to time measures involving large expenditures have been passed against the President's advice and even over his veto,—bills for compensation to veterans, for example. It is one of the defects of the American budget system that it still affords a good deal of elbow-room for dividing the responsibility and evading the blame.

Thrift as a national virtue.

Much unhappiness comes to individuals by reason of their lack of a careful planning in money matters. The nation which tolerates similar incaution, or lack of good planning in its public finance, will eventually get itself into trouble also. Thrift is a national, as well as a personal virtue. We look at the national expenditures and say: "What are three or four billions a year to a hundred and twenty million people? At most it is only thirty-three dollars per capita, less than a dime a day!" But let us not forget that as much, or more, is borrowed in some years for emergency expenses. Nor should it be forgotten that forty-eight states are also taking money from the citizen's pockets and spending it; so are a great host of counties, cities, towns, boroughs, townships, and local improvement districts. There are at least fifty thousand taxing and spending authorities, big and little, in the United States.

Not "a dime a day," but "a dollar a day."

So the total cost of governing the American people is not merely "a dime a day" per head of population but many times that amount. Putting the expenditures of national, state, and local governments together, the total in 1935–1936 must be well over twelve billion dollars. That is about a hundred dollars per capita. And since only one person in four was gainfully employed in private business during the year mentioned it is self-evident that this person had to provide for the per capita public expenditures of the other three. In other words, every citizen engaged in a gainful occupation had to contribute, on a conservative estimate, about a dollar for every working day to the total cost of supplying his country with government. If every employed man or woman in the United States, on coming down to breakfast each morning,

would lay a crisp dollar bill on the table, that would just about liquidate the current cost of American government in all its branches.

Of course the average citizen does not realize that he pays at that rate, or anything like it. In fact he is certain that he doesn't. He knows, to be sure, that his earnings go into rent, grocery bills, gas bills, street car fares, as well as for gasoline, tobacco, liquor, motion picture shows, and wagers on horse races,—but he does not always realize that taxes, taxes, taxes, are a component part of all these payments, so that every time he unsheathes his pocketbook it is to pay taxes. If he did he would not be so unconcerned about government expenditures.

The National Debt

Purpose of the borrowing power.

Not all national expenditures are defrayed out of income. Extraordinary undertakings which involve great outlays, such as the financing of a war, or the construction of an interoceanic canal, or even the relief of unemployment during an economic emergency, cannot be financed out of taxes. It is a truism that governments, like individuals, should live within their incomes as a normal policy and should never borrow to meet their current needs. But from time to time there are situations which require the raising of extraordinary sums and to do this by greatly increasing the taxes would be unwise as well as unpopular. All governments, accordingly, must have the right to incur indebtedness when such emergencies arise. The Constitution of the United States gives to Congress, without any restriction, the right "to borrow money on the credit of the United States."

Absence of limitations upon it.

This is one of the few congressional powers upon which the constitution places no limits whatsoever. Congress can borrow as much as it pleases and in whatever manner it deems expedient. The only limit is the willingness of investors to lend their money. There was a good reason in 1787 for putting no restrictions on the borrowing power because the national credit was so low that difficulty was likely to be encountered in borrowing on any terms. For the new national government was started with a heavy burden of debt on its shoulders. Bonds had been issued during the Revolutionary War both by the confederation and by the several states. The former would certainly be a charge upon the new Union, and the latter would probably have to be taken over as

Beginnings of the national debt.

a part of the national debt. As a matter of fact they were taken over.

The legacy of the Revolutionary War:

The funding of these various obligations, which amounted in all to about $55,000,000, was due to the initiative of Alexander Hamilton, who served as secretary of the treasury during the years 1789–1795. To Hamilton also was due the beginnings of a system of federal revenues which not only provided for the ordinary expenses of government, but made possible the gradual extinction of the nation's indebtedness. During the War of 1812 some new bonds were issued, but twenty years after the close of the war the entire national debt had again been virtually paid off. Not only that, but there was a surplus in the federal treasury which Congress distributed among the states. For twenty-five years, 1836–1861, the United States was the only great country in the world without a national debt of any appreciable dimensions. Then came the Civil War, and during the years 1861–1865 the debt rose by leaps and bounds to an unprecedented height.

Alexander Hamilton's work in funding it.

The Civil War debt.

At the close of the Civil War the interest-bearing indebtedness of the nation stood at about three billions of dollars, but this does not tell the whole story, for much borrowing had taken place in a roundabout way through the issue of paper currency. The financial legacy of the Civil War was steadily reduced, however, and during the twenty years which followed Lee's surrender the national debt was brought down to about six hundred millions. Then the pendulum began to swing once more in the other direction. In the second Cleveland administration bonds were issued to replenish the gold reserve in the treasury, and later, during the war with Spain, there were additional borrowings. The building of the Panama Canal, during the ensuing era, added several hundred millions to the total, so that the national debt on the eve of America's participation in the World War was about a billion dollars in round figures.

The national debt since the Civil War.

The "Liberty" issues.

Viewed in the light of later developments this single billion of the pre-war era seems microscopic. The war borrowings for the two years 1917–1918 alone amounted to twenty-five billions, or more than eight times the highest figure ever reached at any previous time. Of this total about ten billions were loaned to the European countries which were associated with the United States in the war—notably to Great Britain, France, Italy, and Belgium. Immediately after the army was demobilized the United States

government began paying off the war bonds and made good progress until 1930, when the country began to feel the onset of the economic depression.[1] The total at that date had been reduced to about sixteen billion dollars. Then, with the policy of borrowing to finance the relief and recovery programs, the figures began to mount rapidly again. Within six years the total indebtedness of the nation was pushed up to about thirty-five billions, far beyond the war-time peak.[2] Nor does this gigantic figure portray the real magnitude of the burden which governmental indebtedness has placed upon the American people, for the states also have debts, and so have the counties, cities, and towns. No one knows, with any degree of exactness, what this grand total may be.

The mechanism of borrowing.

How does the national government "borrow money on the credit of the United States"? The most common plan is to issue bonds. These bonds are promises to pay on the expiration of a designated period, say twenty, thirty, or forty years, with interest at a stated rate during the lifetime of the bond. For the most part the national government has borrowed from banks or groups of investment bankers, giving them the bonds which they resell to private investors. But government bonds have sometimes been offered for sale by public subscription. To facilitate a direct and general sale to the public some of the issues have been "baby bonds," issued in small denominations.

Treasury notes.

From time to time the United States has also borrowed money by the issue of treasury notes. These are promissory notes issued in varying denominations and maturing within a short time, usually from six months to three years, or even on demand. In most instances they have been issued bearing interest, but in a few cases they have been non-interest-bearing. Treasury notes of the latter variety were issued during the Civil War, but after 1865 most of them were converted into interest-bearing bonds. During the World War large issues of interest-bearing treasury notes were also put on the market from time to time, also savings certificates and thrift stamps as a means of borrowing from small investors.

Government borrowing by an inflation of the currency was

[1] W. F. Willoughby, *Financial Condition and Operations of the National Government, 1921–1930* (Washington, 1931).

[2] This figure does not include obligations guaranteed by the United States, such as the bonds of the home owners' loan corporation, the farm loan bonds, the national housing act guarantees, and so on.

Borrowing by an inflation of the currency.

extensively practiced in various countries of continental Europe during the World War and after it. There is nothing in the Constitution of the United States that prevents resort to the same practice by Congress. During the Civil War the national government used this method of securing funds and its right to make "fiat" money legal tender in payment of private debts was subsequently upheld by the courts.[1]

Borrowing by devaluing the standards of values.

Calling in all the gold coin and then devaluing it, as was done in 1933–1934, may also be looked upon as a method of getting funds from the people without taxing them. This action, at any rate, gave the national treasury more than two billion dollars which otherwise it would have had to obtain by borrowing. Certain issues of currency, such as silver dollars, silver certificates, and fractional coins, have sometimes been cited as examples of a method whereby a government can help to finance itself, because such currency yields more to the national government than it costs. Ordinarily the silver dollar does not contain a dollar's worth of silver, nor does the nickel represent five cents' worth of that metal. The difference between what they cost and what the government gets for them, however, is a profit rather than a loan.

Repudiation of public debts.

In no case has there ever been a repudiation of the American national debt or any part of it. Repudiation of the debts owed by some of the individual states, however, has occurred on several occasions.[2] Where such action takes place, the holder of a repudiated bond has no effective legal redress. He cannot sue the state except in its own courts, and even there he has no status as a plaintiff unless the state gives it to him, which it is not likely to do. He cannot enter suit in the federal courts, because the eleventh amendment prohibits the federal courts from hearing any citizen's suit against a state.

The fourteenth amendment as a security against repudiation.

After the Civil War there was a fear in financial circles that some portions of the national debt might be repudiated. To allay these misgivings the fourteenth amendment provided in 1868 that "the validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." It was further stipulated that neither the

[1] See *below*, p. 391, *footnote*.

[2] Eleven states, mostly in the South, have repudiated some of their state issues at various times. W. A. Scott, *The Repudiation of State Debts* (New York, 1893).

United States nor any state of the Union should assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave. Debts incurred by the Confederacy or by any state of the Confederacy in connection with the Civil War were thus nullified by constitutional provision.

The practice of refunding.

The burden of a national debt may at times be lessened by the process known as refunding. The government, when bonds are issued, usually reserves the right to pay them off at any time after a designated date. If at that date the general rate of interest has fallen, it may secure money to make the repayment by issuing new bonds at the lower rates. Or, at the expiry of the term designated in the bonds, it may offer the holders their choice between cash payment and new bonds bearing the lower rate of interest. If the government, for example, borrows a billion dollars at four-and-one-quarter per cent in war time on bonds which are to run from ten to twenty years, this does not mean that it must pay the original rate during the maximum term of the bonds. It can, and probably will, "refund" the loan at the first optional date by the issue of new bonds bearing only three-and-a-half or even three-per-cent interest. This is entirely fair to the original bondholders, who get their option of taking cash payment if they do not want the new bonds. It is thus possible to lessen the burden of a national debt without actually reducing its total amount.

Sinking funds.

Many states and municipalities, when they issue bonds, establish "sinking funds" to provide for the payment of the bonds at maturity. Then they pay into these funds a certain amount from their revenues each year. The sinking funds are invested and held by trustees. The national government does not pursue this method, but each year it uses a part of its regular revenue to buy up some of its outstanding bonds from private holders, and reduces the total debt to that extent. Until recent years all public debts were looked upon as public evils. To get a country out of debt was deemed to be highly desirable, and whenever there was a surplus in the treasury it was used to reduce the national indebtedness. Of late, however, the world seems to have become reconciled to the permanency of huge national obligations. No serious attempt is being made to reduce them anywhere.

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CHAPTER XXII

CURRENCY, BANKING, AND CREDIT

On credit all the intercourse of humankind depends.—*Livy.*

The constitution, in terse language, gives Congress the exclusive power to coin money. It says nothing about the right of Congress to issue paper notes, although it expressly withdraws that right from the states.[1] These arrangements, which gave the national government virtually complete control over the currency, were the outcome of experience during the years preceding 1787. The framers of the constitution realized, from this experience, that so long as each state retained the power to coin money and to issue paper notes the country could not hope to have a uniform standard of values or a stabilized medium of exchange.

The currency power of Congress.

These are the two chief purposes which money is intended to serve. In the early stages of economic civilization all exchange of products was by barter. The man who had caught more fish than he needed would exchange some of them for arrows, or skins, or corn. But barter is a clumsy and inadequate method of exchange because it means that two persons must be found each of whom wants what the other has to give. So it became desirable to find a medium of exchange, in other words some single substance or commodity which would be universally wanted and hence readily exchangeable for any commodity at any time. Thus money originated as a tool to overcome the practical difficulties of trading by barter.

A foreword on the origin and purpose of money.

Just when it originated we do not know. History gives us no record of a time when something or other was not being used as a medium of exchange. When Europeans first came to America they found the Indians using wampum as currency. These were small beads made out of sea shells and highly prized as ornaments. Being universally desired by the aborigines, such beads became the recognized currency of the wilderness. The early colonists of

Gold and silver as currency.

[1] The states, nevertheless, may charter banks and may give these banks the right to issue paper notes, but since 1863 all such notes have been subject to a federal tax of ten per cent per annum and hence none of them have been in circulation subsequent to that date.

Virginia, having no such high regard for wampum, used tobacco as a temporary medium of exchange, for everybody grew tobacco and it was in universal demand. But no form of ordinary merchandise makes a satisfactory medium because it is likely to fluctuate considerably in value, so gold and silver were ultimately chosen to serve because of their relative stability. Likewise these metals have a high value in proportion to their bulk and they are durable. They can be used not only to facilitate exchange but as a means of storing value without the risk of deterioration which would be incurred by the use of most other commodities. Finally, the precious metals have uniformity—every ounce of fine gold or silver is exactly like any other ounce, no matter when or where it was produced.

Currency in colonial America.

When gold and silver came to be used as media of exchange it seemed advisable to provide some governmental regulations. Kings and other rulers took control of the monetary system; they set up standards of weight and fineness; they assumed the exclusive right to coin money and often turned this monopoly into a source of profit for themselves. Coinage, at any rate, had everywhere become a governmental function long before America was discovered. The English colonies in the new continent provided no uniform currency of their own, hence all sorts of money—English, French, Spanish, and Portuguese—circulated freely although some of them were of uncertain value. This situation was a handicap to trade but it was made considerably more serious during the Revolution when both the states and the Continental Congress began issuing large quantities of paper money. These issues continued, even after the war was over, until the huge inflation completely demoralized the monetary system.

The federal coinage in the nineteenth century.

One of the first tasks of the new federal government, therefore, was to provide a sound and uniform national currency. On the recommendation of Alexander Hamilton, the first secretary of the treasury, Congress authorized the establishment of a mint for the coining of silver and gold at a ratio of fifteen to one and adopted the decimal system, with dollars, dimes, and cents. Gold and silver continued to be coined until 1873 when the coinage laws were revised and the minting of silver dollars ceased. This aroused much opposition and during the next quarter of a century the "free coinage of silver" issue became a prominent one in national politics. There was a widespread conviction that such free coinage

of silver would raise the general level of prices and stimulate prosperity in the agricultural regions.

The conflict over bimetallism.

The Democrats, under the leadership of Mr. Bryan, fought the election campaign of 1896 on a platform which demanded the free and unlimited coinage of silver dollars at a ratio of sixteen to one. The Republicans, on the other hand, supported the single gold standard. The Republican victory at this election did not end the free silver agitation, but it virtually ensured the continuance of the gold basis, and the matter was definitely settled by the gold standard act of 1900 which required the treasury to keep all forms of currency on a parity with gold. In other words the treasury was bound to redeem any other kind of money by giving 25.8 grains of gold, nine-tenths fine, for each dollar of it. Into the economic merits of the controversy over free silver it is not necessary to proceed; but the question bulked large in political discussion until it was brought to a close by the act of 1900.[1]

The abandonment of the gold standard in 1933.

From 1900 to 1933 the United States was firmly on the gold standard. Silver dollars were coined and circulated to some extent, but they did not serve as a standard of value. The United States remained on a gold basis throughout the World War when several other countries had to abandon it. In the spring of 1933, however, the crisis in American banking became so acute that all holders of gold coin, gold bullion, and gold certificates were ordered by the national government to deliver the same to a federal reserve bank or to a member bank in exchange for paper currency. Under threat of prosecution there was a general compliance with this demand.

The devaluation of the dollar.

Having secured control of all the gold coin, gold bullion, and gold certificates the country was presently taken off the gold standard in name as well as in fact. Paper money became inconvertible into gold. Then Congress authorized the President to reduce the gold content of the standard dollar to not less than fifty per cent of its traditional amount, and under this authorization the President, in 1934, devalued the dollar by about forty-one per cent.[2] At about the same time the national treasury,

[1] For detailed accounts see Davis R. Dewey, *Financial History of the United States* (12th edition, New York, 1934), J. L. Laughlin, *History of Bimetallism in the United States* (4th edition, New York, 1900), and F. W. Taussig, *The Silver Situation in the United States* (3rd edition, New York, 1898).

[2] To be exact, the devaluation brought the dollar to 59.06 per cent of its former parity.

under authority of Congress, took over from the federal reserve banks the stock of gold which they had accumulated, paying for it in paper money. A large part of the "profit" due to this devaluation and transfer was set aside as a stabilization fund to steady the dollar on its new basis and to support the national credit. Thus gold became nationalized. The federal government now holds the entire monetary stock of gold in the United States.

Coinage of silver resumed.

But this was not all. In the spring of 1934 Congress passed a silver purchase act which authorized the secretary of the treasury to purchase silver until the metallic reserve should be made up of gold and silver in the proportion of three to one. Against this purchased silver the treasury was authorized to issue silver certificates to full value. Likewise, in order to assure uniform value to the coins and currencies, Congress abrogated the "gold clause," a provision calling for payment in gold coin of standard weight and fineness which had been commonly written into bonds and contracts. So far as private bonds and obligations are concerned, this action was subsequently upheld as constitutional by a five-to-four majority of the Supreme Court.[1] The court, however, ruled that Congress had no right to refuse fulfillment of the gold clause obligation in government bonds. But it pointed out that no one had suffered any actual loss by reason of such non-fulfillment and hence that no right to recover damages had arisen. Thereupon Congress, to guard against any future contingency, passed an act providing that after July 1, 1936, no suit against the United States arising out of gold clause obligations should be entertained by the courts.

The legal tender issue.

Congress, as has been said, was given from the outset the right "to coin money," but the constitution does not give Congress any authority to issue paper money, neither does it forbid such action. Not until the Civil War, however, did Congress avail itself of the privilege thus accorded by the silence of the constitution, although on two occasions it set up banks with the right to issue paper notes. But in the stress of the great civil conflict the national government authorized its first direct issue of paper currency known as "greenbacks." These were inconvertible notes, not redeemable in either gold or silver. In order to ensure them a ready circulation these notes were declared to be legal tender for

[1] The Gold Clause Cases, *below*, p. 531, *footnote*. On the monetary policy of 1933–1934 see S. C. Wallace, *The New Deal in Action* (New York, 1934), pp. 41–51.

all payments except customs duties and interest on government bonds. For a time it was a much-debated question whether Congress, in the absence of express constitutional authority, had a right to issue such paper money, but the Supreme Court finally decided in 1871 that the action came within the implied powers of the national government as a method of borrowing money.[1] It is now well established, therefore, that Congress can authorize the issue of paper money to any extent that it pleases and under such conditions as it may see fit.

The present welter of currency.

The present currency reserves and circulation of the United States falls into at least nine classes: (1) gold coin, in denominations from five to twenty dollars, all of which is held in the treasury as a reserve and most of which has now been melted down into bullion; (2) gold certificates, given in large denominations to the federal reserve banks when they were required to surrender their metallic reserves; (3) standard silver dollars, fractional silver (half-dollars, quarters, and dimes), and fractional small coins (nickels and cents); (4) silver certificates backed by treasury accumulations of silver bullion and silver coin; (5) United States notes or "greenbacks"; (6) treasury notes, which are almost out of existence since they are never reissued when turned in; (7) national bank notes, which are now in process of being called for cancellation; (8) federal reserve notes issued against the security of gold, commercial paper, and United States government securities; and (9) federal reserve bank notes secured by government bonds and other approved securities. Those which were issued during the banking emergency of 1933 are now being retired.

It is no serious inconvenience.

This is a wider variety of currency than can be found in any other country. Naturally it is perplexing to foreign students of public finance who are familiar with notes of a single variety. It should be borne in mind, however, that four of the above-named types of currency, that is, gold, gold certificates, treasury notes, and national bank notes are no longer factors of any consequence in monetary circulation. As for the rest, the diversity is not objectionable so long as all the different kinds of currency are maintained at a parity with one another. Nobody looks to see whether the bills that he receives at the bank cashier's window are silver certificates or federal reserve notes. He is content with the fact

[1] The Legal Tender Cases, 12 Wallace, 457 (1871). See also Juilliard *v.* Greenman, 110 U. S. 421 (1884).

that in making purchases or paying debts one is just as good as the other.

Banks and Banking

May Congress charter banks?

During the first quarter of the nineteenth century the Supreme Court was also called upon to settle the question whether Congress could establish a national bank. The constitution contains no mention of banks or banking. A proposal to give the national government such power in express terms was rejected by the constitutional convention. Accordingly the right to charter and regulate banks might be looked upon as falling within the residual powers of the states. But Alexander Hamilton as secretary of the treasury did not so understand it. On the contrary he worked out a plan for the establishment of a great financial institution somewhat after the model of the Bank of England, and in 1791 Congress chartered the first Bank of the United States, a semi-public institution with twenty per cent of its stock owned by the government. The ostensible purpose in establishing this bank was to assist the national government in the exercise of its borrowing power, the collection of its revenues, and the custody of its funds.

The first Bank of the United States (1791–1811).

Its history and end.

The first Bank of the United States continued in existence until 1811 when its twenty-year charter expired. It established eight branches in different parts of the country, served as a depositary for public funds and loaned the government considerable sums of money. The bank was well managed and proved profitable, but its charter was not renewed in 1811, chiefly because it had aroused the opposition of many small state banks whose jealousy of the national institution was now reflected in Congress. Moreover, although its control remained vested at home, the bank had allowed more than two thirds of its capital stock to pass into the hands of foreigners, and it was also criticized for making unduly large loans to the federal government.[1]

The second Bank of the United States.

A few years later, however, the financial embarrassments caused by the War of 1812–1815 determined Congress to establish a second Bank of the United States, and its charter was signed in 1816 by President Madison whose earlier misgivings on the question of constitutionality had become mollified. The capital of this bank was fixed at thirty-five millions; it was empowered to

[1] For the history of this bank see J. T. Holdsworth, *The First Bank of the United States* (Philadelphia, 1910).

issue paper money, served as a depositary for public funds, assisted the treasury department in the collection of the public revenues, and at times made temporary loans to the national government. Like the first bank it was a semi-public institution and its charter was fixed to run for twenty years.

The question of its constitutional status.

Thus far the authority of Congress to charter a bank had been a theme of much controversy among politicians and pamphleteers, but the issue had never come squarely before the Supreme Court. Soon after the second Bank of the United States had begun its operations, however, the question of constitutionality was brought forward in a way which enabled the point to be settled definitely and for all time.

The decision in McCulloch *v.* Maryland.

What happened was this: In 1818 the legislature of Maryland imposed a stamp tax on all paper money issued by the bank within that state, and the cashier of the Baltimore branch, McCulloch, refused to pay this tax. He was convicted by the Maryland courts and appealed to the Supreme Court of the United States, which proceeded to set a constitutional landmark by its decision in the case of McCulloch *v.* Maryland.[1] While the immediate issue was whether the state of Maryland had the right to tax the bank, this raised the more fundamental question whether Congress had the right to charter a bank at all. A notable array of legal talent was on hand to argue the matter. Daniel Webster appeared as chief counsel for the bank while Luther Martin, one of the delegates at the constitutional convention in 1787, appeared on behalf of Maryland.

Chief Justice Marshall on the implied power to charter banks.

The decision in the case, written by Chief Justice Marshall, has become one of the classics of American jurisprudence. It is the longest and most masterful of all Marshall's decisions. In words which for clearness and force cannot be improved upon, he pointed out that the constitution had expressly given the national government power "to lay and collect taxes" and "to borrow money on the credit of the United States." It had also expressly granted to Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Putting these provisions together, Marshall declared that the constitution intended Congress to have all reasonable discretion in choosing the means best adapted to the furtherance of its policies. Here is the way he phrased it:

[1] 4 Wheaton, 316 (1819).

"A government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast Republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?"

A corollary from the general principle.

Congress having been authorized to provide its own financial agencies, it follows that any institution created in this way must not be subjected to the danger of destruction by the states. "If," declared the court, "the states can tax one instrument employed by the [national] government in the execution of its powers, they can tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the customhouse; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." And since the power to tax involves the power to destroy, Marshall argued, this power of the states, if permitted, would make possible the destruction of the national government. For this reason the law of Maryland which taxed the circulation of the United States Bank was declared unconstitutional.

Importance of the decision.

The decision in this case attracted nation-wide attention, and was of the highest importance, for it set the powers of the federal government upon a firm and sure foundation. It gave them new vitality. Marshall's brilliant biographer declares that it "rewrote the fundamental law of the nation," which is overstating the matter; but the decision is nevertheless an outstanding example of Marshall's intellectual power, his political sagacity, his judicial statesmanship, and his mastery of the English tongue.[1] If his

[1] Albert J. Beveridge, *Life of John Marshall* (4 vols., Boston, 1916–1919), Vol. IV, p. 308.

fame as a jurist rested on this one decision alone, it would still be secure. For the decision in McCulloch *v.* Maryland made the power of Congress a living thing, capable of growth, and able to keep pace with the progress of the nation. It entitles Marshall to be ranked as a statesman as well as a jurist, taking into account the fateful influence of his work upon the structure of American government.

Public feeling then and now.

The extreme champions of states' rights denounced the Supreme Court in violent terms when this decision was announced. "A deadly blow," they sputtered, "has been struck at the sovereignty of the state," by judges who are "so far removed from the people as to be hardly accessible to public opinion." The court was assailed with the same hasty anger that has so often marked its denunciation in later years by those who do not like its attitude at the moment. In 1819 the critics condemned the court for giving the federal government too much power; a hundred years later they were condemning it for conceding too little. Today no one believes that the decision in McCulloch *v.* Maryland was unwise. On the contrary it is conceded to have been a nation-making stroke, a triumph of union over sectionalism, and to have saved Congress from what would surely have been the first of a long series of inroads upon its constitutional power.

Jackson's war on the bank.

The second United States Bank came to an end in 1836, but not because of any doubts as to its constitutional status, nor because it was unsuccessful. Getting enmeshed in politics the bank incurred the wrath of Andrew Jackson and his friends. They charged that the managers of the bank's branches in different parts of the country were showing political favoritism in making loans, and that the bank itself was becoming a financial octopus. This line of attack proved effective in a day of strong anticapitalistic feeling. Jackson vetoed a bill passed by Congress for renewing the bank's charter and withdrew all government deposits from it. Forced to the wall, the institution was converted into a state bank, but in this form it did not prove a success and finally went out of existence, thus leaving state banks a clear field everywhere.[1]

Although movements for the establishment of a new national bank with a federal charter were set afoot from time to time during

[1] The full history of its vicissitudes may be found in R. C. H. Catterall's *Second Bank of the United States* (Chicago, 1903).

Banks and banking from the Jacksonian era to the Civil War.

the next twenty-six years, none of them materialized. The banking operations of the country were carried on during this period by institutions chartered in the several states under a great variety of banking laws, good, bad, and indifferent. These banks flooded the country with paper money, backed by an insufficient reserve in either silver or gold. From time to time this brought them into serious difficulties and when the Civil War broke out the whole arrangement collapsed. The state banks ceased redeeming their notes in coin. Nor could they give the national government any appreciable help in floating its war loans. In 1863, therefore, when the secretary of the treasury was hard pressed in his effort to sell bonds on reasonable terms, Congress was induced to pass the first of the laws on which the national banking system rests today.

The national banking act of 1863.

Briefly, the national banking act of 1863, as considerably amended by various other statutes passed in later years, imposed a heavy tax upon the paper money of all state banks, with intent to drive these notes out of existence. It then arranged that any bank incorporated under the new law might issue untaxed circulating notes, provided it bought United States bonds to a designated amount and deposited these bonds in Washington as security for its note issues. Fundamentally, then, this legislation was merely a scheme to create an artificial market for government bonds at a time of great national need, although a secondary purpose was to substitute uniform bank notes (with a federal guarantee) for the variegated and fluctuating paper money of the state banks. The act of 1863 was fundamentally a borrowing measure under color of a banking law.

Its merits.

Nevertheless, as a banking law it worked out surprisingly well, and the national banking system which it established was considerably improved during the remaining years of the nineteenth century. The essential provisions of the original act are still in operation although the importance of the national banks, as fiscal agents of the government, has now been greatly diminished by the activities of the federal reserve bank system. The original function of the national banking system, moreover, has now been nullified by the calling of the bond issues which supported the national bank notes and the consequent cancellation of these notes. A national bank, it should perhaps be explained, is a bank which holds its charter from the national government and is subject to

its supervision. A state bank, or trust company, is one that gets its charter from the state government and is subject to state supervision.

Defects of the national banking system:

Although the system of national banks rendered good service in the development of the country during decades following the Civil War, it had various shortcomings which bankers and business men recognized. For one thing the requirements relating to bank reserves were so inflexible that they became embarrassing to the banks in times of commercial depression. Every national bank was (and still is) required to keep a "reserve" amounting to a certain percentage of its total deposits. It was not necessary to keep this reserve in the bank's own vaults; a part of it might be placed upon deposit in larger banks where it would draw interest. In times when business was good and money plentiful this arrangement worked satisfactorily; but when periods of business depression arrived and money became scarce every small bank began to draw upon its reserve deposits in the larger banks, and the latter naturally found some difficulty in paying them all at the same time.

1. Inelasticity of reserves.

2. Inelasticity of note issues.

Another defect arose from the rigidity of the limitations on the issue of paper notes. Each national bank could issue paper money, but only up to the amount of the government bonds which had been deposited by it in Washington. When business was good the demand for paper money (to carry on the operations of business) naturally increased; but there was no corresponding increase in the amount of national bank notes available to take care of this business expansion. This was because the national bank notes were tied to government bonds and the latter bore no relation to the volume of business done in the country. What was needed, therefore, was some arrangement whereby bank notes and bank credit would automatically expand in times of business prosperity and deflate with a reduced volume of business transactions.

The federal reserve bank system established (1913).

To provide this elasticity was the purpose of the federal reserve bank act which Congress passed in 1913. By the provisions of this statute (considerably amended in 1935) the United States is divided into twelve federal reserve districts, with a federal reserve bank in each. The capital stock of each federal reserve bank is held by banks within the district—member banks, they are called. Member banks include not only national banks but state banks with average deposits of more than a million dollars which have such

deposits insured with the federal deposit insurance corporation (see p. 402). Each reserve bank is controlled by a board of directors, which in turn appoints a president and vice president with the approval of the board of governors of the federal reserve system. The president (or in his absence the vice president) constitutes the chief executive of the bank, and all other officers and employees are responsible to him. The board of directors may appoint additional vice presidents without the approval of the board of governors.

Its governing body.

This board of governors, with its headquarters in Washington, has general supervision over the twelve federal reserve banks. It is composed of seven members appointed by the President of the United States with the advice and consent of the Senate for fourteen-year terms. Members are not immediately eligible for reappointment after having served a full term. Not more than one member may be appointed from any federal reserve district. One member of the board is designated by the President as chairman and another as vice chairman, each to serve as such for a four-year term.

The "open-market committee."

The banking act of 1935 made provision for the creation of a federal "open-market committee" consisting of the members of the board of governors and five representatives of the various federal reserve banks. These representatives are chosen annually by the boards of directors of these banks which are arranged into five groups for the purpose of making the selection jointly.[1] An alternate, to serve in the absence of each representative, is chosen by the same procedure. This open-market committee controls the actions of the twelve federal reserve banks in buying and selling, at home and abroad, bonds, notes, and other obligations of the United States. Such open-market operations are intended to regulate the supply of bank credit available for business operations. When the reserve banks, for example, buy in the open market a billion dollars worth of government obligations this eases commercial credit conditions by injecting a billion dollars into the money market where these dollars will presumably seek commercial investment. In addition it strengthens the market for government securities, thus keeping up the price of the latter. On the other hand when the reserve banks sell a billion dollars worth of govern-

[1] New York and Boston, Philadelphia and Cleveland, Chicago and St. Louis, Richmond, Atlanta and Dallas, and Minneapolis, Kansas City, and San Francisco.

ment bonds the effect is just the opposite, that is, to harden commercial credit conditions by taking available funds out of the ordinary channels of commercial investment. In this way the open-market operations of the federal reserve banks can be used to promote or to check credit expansion. The danger is, of course, that such action may be dictated at times by political exigencies rather than by economic needs.

The twelve federal reserve banks serve as depositaries for the reserves of member banks in their respective areas. They also lend funds to these member banks upon various forms of approved security. To do this they issue federal reserve notes, subject to certain limitations which will be explained presently. This system is designed to endow the operations of the member banks with flexibility by enabling them to obtain ample funds whenever they need money to supply demands for loans from their customers. In other words the federal reserve system aims to give the United States all the advantages which other great countries derive from their centralized banking systems, but without creating a single gigantic institution like the Bank of England or the Bank of France.

"Bankers' banks."

Federal reserve banks, in short, are "bankers' banks"; they do relatively little business directly with individual customers. They have three chief functions, namely (1) to serve as depositaries for surplus government funds and for the reserves of member banks; (2) to act as fiscal agents of the national government in facilitating the collection of its revenues or the sale of its bonds; and (3) to provide rediscounting facilities for the use of all the member banks. This term "rediscounting" should have a word of explanation.

The process of discounting.

Rediscounting, of course, is preceded by discounting. When a national bank or state bank lends money and takes a man's note, with or without collateral security, it is said to "discount" the note. It gives the borrower the face value of his note less the interest, whatever it is, calculated at the current rate. Thus if the rate is five per cent and the person gives his note for one thousand dollars payable in six months, the bank would hand him $975 in money. Business men obtain large sums of money from the banks by getting their notes discounted; they borrow money in this way to buy goods and then pay off their notes when the goods are sold. Such notes are called "commercial paper."

Rediscounting.

Now suppose a bank has loaned all the money it has to spare. When it receives applications from its customers for more loans, what does it do? It takes a bundle of business men's notes, or other eligible collateral, from its vaults and sends these to the nearest federal reserve bank. The latter does just what the member bank did in the first instance; it deducts the discount and gives the balance to the member bank in money. The member banks are enabled, in this way, to loan a great deal more money than would otherwise be the case. It is a revolving process. Each loan that a bank makes on eligible paper is a basis for getting money with which to make more loans.[1]

Note issuing by federal reserve banks.

But how do the federal reserve banks obtain the money to do this? They are allowed to issue paper money known as *federal reserve notes* on the security of rediscounted commercial paper and other collateral, provided they keep a reserve in gold certificates amounting to forty per cent of the total notes issued. This reserve they obtain by serving as depositaries for the surplus funds of the government and for the reserves of member banks. In time of emergency, however, the forty-per-cent requirement can be relaxed with the approval of the board of governors. In addition the federal reserve banks are empowered to issue *federal reserve bank notes* secured by United States bonds in the way that national bank notes were formerly secured.

Merits and shortcomings of the federal reserve system.

During the twenty years which followed their establishment in 1913 the work of the federal reserve banks proved to be of great value. Banking operations were enabled to expand easily during the war years and to contract when the war was over. But during the great business upsurge which took place during the years 1925–1929 the system did not provide an adequate brake on the overexpansion of credit. Bank loans increased to the unprecedented total of over forty billion dollars. Much of this credit was used for speculation with the result that stock-exchange securities, commodity prices, and real estate values were pushed to high levels. Then, in the autumn of 1929 when the stock market began to fall rapidly, many banks found that the collateral which had

[1] The terms discounting and rediscounting should not be too strictly construed. Sometimes the bank gives the borrower the full amount of his note and collects the interest when the note matures. Such notes are similarly eligible for rediscounting. The rules as to eligibility have been extended to include not only commercial paper but notes secured by mortgages. Wide latitude with respect to the rules has also been vested by the banking act of 1935 in the board of governors of the federal reserve system.

been deposited with them as security for loans was no longer adequate. To protect themselves they sold this collateral, in the form of stocks and bonds, thus glutting the market and depressing it still further. In this way other loans were thrown into the under-collateralized class and the procedure of liquidation took on the proportions of a panic.

The banking collapse of 1933.

Congress empowered the reconstruction finance corporation to assist the banks by making loans to them, but the publicity given to such loans impaired public confidence in the banks which obtained them. Bank depositors became alarmed and began to withdraw their deposits for hoarding in safe deposit boxes. Finding their loans "frozen" in notes and mortgages which could not be promptly collected many banks in all parts of the country were unable to meet these demands of their depositors and hence were obliged to close their doors. To forestall a general collapse the governors of a few states proclaimed a bank holiday, this holiday to continue until the banks could get themselves into shape for reopening. But the contagion quickly spread and by March 4, 1933, all the states had closed their banks by the device of holiday proclamations. This was the day on which President Franklin Roosevelt took his inauguration oath. On the following day he transformed these state holidays by proclamation into a national bank holiday. Every banking institution in the United States was closed. The American banking system had collapsed.

The emergency banking act.

At once a special session of Congress was called and in record time it passed the emergency banking act of March 9, 1933. Among other things this act liberalized the provisions relating to the issue of federal reserve bank notes by permitting the reserve banks to make advances not only on commercial paper and government bonds but on any acceptable assets of a member bank, including mortgages. Thus it became possible for the banks, including banks which were not members of the federal reserve system, to transform a large part of their assets into currency. Within a short time the national bank holiday was brought to an end and the reopening of the banks began. But banks which seemed to be insolvent were not allowed to resume full operations. They were placed in the hands of conservators and permitted to do only a limited banking business (with restrictions on the withdrawal of deposits) until their affairs could be straightened out. In this connection a provision was made whereby the reconstruction finance corporation

advanced funds to large numbers of banks and took the preferred stock of these banks in return. In this way the banks were greatly strengthened against a future emergency.

The insurance of deposits.

This legislation, however, was passed hurriedly to cope with a crisis. It was not designed to provide the banking system with a permanent basis and hence was followed in due course by a more comprehensive banking measure which aimed to improve banking practice throughout the country and also provided for a guarantee of bank deposits through a government agency known as the federal deposit insurance corporation. Under this arrangement a fixed total of $5,000 of all accounts of a depositor in any single institution is insured in full. To cover these insurance obligations a fund was created by contributions from the national government and the federal reserve banks as well as by levying a fixed annual assessment on all banks participating in the plan.[1]

State banking institutions.

The foregoing legislation marked a great advance on the part of the national government into the field of banking and credit regulation. Nevertheless a large part of the country's banking facilities are still provided by state banks, some of which are members of the federal reserve system while others are not. There are more than 10,000 state banks and approximately half that number of national banks. Unless a state bank is a member of the federal reserve system or of the federal deposit insurance corporation it is not subject to any national regulations. It remains solely responsible to the state banking authorities. The banking laws of the various states display all degrees of strictness and laxity. Much of our trouble has been due to this diversity. Today, however, nearly all the state banks have come under the federal deposit insurance corporation and hence are subject to federal control in some degree.

Defects of the dual system.

In its present situation the American banking system still leaves much to be desired. Its duality is a defect, for credit is a national requisite which recognizes no geographical or political boundaries. It surges backwards and forwards with every season of prosperity and depression. Obviously, then, a country's system of credit should be unified so that it can be regulated nationally. From this point of view there is no sound justification for the maintenance of forty-nine banking systems within the same nation

[1] The annual assessment is one twelfth of one per cent of each bank's total deposits.

and the banking act of 1935 may therefore be regarded as a commendable (although only a partial) step in the right direction. Not only are there too many banking systems in the United States but there are too many banks,—over 15,000 of them altogether. Consolidation of the smaller institutions into a limited number of strong branch-banking institutions would be advantageous.

Farm Credit and Other Banking Agencies

The federal land banks.

The national banking system and the federal reserve banks were developed, in the main, to meet the requirements of industry and commerce. They did not cater to the special needs of agriculture and stock-raising. Yet these needs increased during the opening decades of the twentieth century, for as agriculture becomes more specialized its operations require more capital. The grain farmer of the West, the cotton planter, the rancher, the fruit grower, the dairy farmer—all require credit facilities beyond those which were needed by the diversified farming system of earlier days. They need money to purchase equipment, pay wages, and carry them through from one crop-sale to another. Diversified farming brings in cash returns every little while; but specialized agriculture in many cases does not bring more than one or two cash payments per annum—when the wheat or cotton crop is sold, or the cattle marketed, or the fruit sent to the canneries.

How organized and controlled.

To furnish these farmers and ranchers with banking facilities as good as those which had been provided for the merchant and manufacturer, Congress in 1916 passed the farm loan act establishing a system of federal land banks. The entire country was divided into twelve districts, in each of which a federal land bank was established with various officers and directors who are now appointed by the farm credit administration at Washington. This farm credit administration supervises the whole agricultural credit system which includes not only the federal land banks and joint stock land banks but the intermediate credit banks, the production-credit associations, the banks for coöperatives and the federal farm mortgage corporation.

How they function.

The federal land banks do not ordinarily lend directly to individual farmers or ranchmen but to farm loan associations. Since 1932, however, these banks have been empowered to make loans directly in areas where there are no such associations. Any ten or more farmers desiring to borrow money can form a farm loan

association, each farmer taking stock in his association to the equivalent of five per cent of the total amount which he may desire to borrow. Every borrower, therefore, is ordinarily a stockholder in a national farm loan association, and every such association is a stockholder in its district bank. But loans may be made directly to individual farmers in certain cases and many such loans have been arranged. In any event the loan must not exceed $50,000 or be in excess of fifty per cent of the appraised value of the farm which is given as security; the maximum rate of interest is five per cent, and repayments are made in semi-annual amounts which have to be paid during a specific term of years. Finally, the loan must be obtained for some purpose directly connected with agriculture and not for speculation.

Where the federal land banks get their funds.

Where do the federal land banks get the money with which to make these loans? They do not issue notes, like federal reserve banks. But they are authorized to sell bonds based upon the mortgages which they hold. These bonds (known as federal land bank bonds) are bought by private investors. They are tax-exempt and for this reason are regarded as a desirable private investment. This process of borrowing by the sale of bonds and lending to farmers on mortgages is carried on by the federal land banks to any amount so long as the total bonds do not exceed twenty times the amount of the bank's paid-up capital stock. To put the thing in a nutshell: the banks borrow money from private investors and then lend it to the farmers at a slight advance in interest. The lending is principally done through loan associations in a way which makes each association the guarantor of all loans secured by its members.

Federal farm mortgage corporation.

Large numbers of mortgage loans were made prior to 1930 through these federal land banks as well as by the regular commerical banks but when the economic depression became acute many of these mortgages went into default and were foreclosed. Again the national government came to the rescue by creating the federal farm mortgage corporation to provide the federal land banks with additional funds. To this end the federal farm mortgage corporation is authorized to issue its own bonds which are unconditionally guaranteed by the national government. These bonds are given to the federal land banks in exchange for bonds of these banks. By this arrangement the land banks have had their lending capacity greatly increased. In addition the land bank commissioner, an official of the farm credit administration, is

authorized to make farm mortgage loans of a more or less emergency character, separate and distinct from land bank loans. The federal land banks act as agents of the land bank commissioner in making these loans. The land bank commissioner in turn is financed by the federal farm mortgage corporation which gives him its own bonds in return for his mortgages.

Other banking facilities for the farmer:

But this is not all that the national government has done in the way of providing special credit facilities for the agriculturist. Prior to 1916 there were many private banks and mortgage companies engaged in the business of lending money to farmers. These institutions feared that their business would be completely wiped out by the competition of the new federal land banks, hence they urged that some protection be afforded to them. It was accordingly provided that these institutions might become joint stock land banks by complying with certain conditions. All their capital stock was to be supplied by individual stockholders, but they were also permitted to obtain money by selling bonds and these bonds were exempted from taxation. This feature of the system was much criticized and in 1933 the privilege of issuing further tax-exempt bonds was withdrawn from them. Likewise it was provided that they should make no further mortgage loans, so they will ultimately be liquidated and go out of business.

1. Joint stock land banks.

2. Intermediate credit banks.

The federal land banks and the land bank commissioner lend money on the security of land mortgages, in other words they make long-term loans. They do not make short-term loans on personal property such as live stock, cotton, grain, or other produce of the land. To provide this form of agricultural credit there are twelve intermediate credit banks. These are located in the same twelve cities as the federal land banks and are under the supervision of the same directors. Their capital was supplied at the outset by the government, but the banks obtain additional funds by selling to the investing public their short-term collateral trust debentures secured by the notes or other obligations of borrowers. These federal intermediate credit banks rediscount short-term notes for national banks, state banks (or trust companies), savings banks, agricultural coöperatives, live stock loan associations, production-credit corporations, and similar organizations, provided the original loans were made for agricultural purposes. Thus the intermediate credit banks, like those of the federal reserve system, function chiefly as banks of rediscount.

Banks for coöperatives and production-credit corporations.

For a similar service to coöperative associations a central bank for coöperatives has been set up in Washington with a regional bank for coöperatives in each of the twelve federal reserve districts. Coöperative associations, by subscribing for a designated amount of stock in these banks, may obtain loans for the purchase of merchandise or for the acquisition of property. Likewise twelve production-credit corporations have been established in the twelve reserve areas. These corporations organize and supply funds for production-credit associations which may be formed by any group of ten or more farmers who desire to borrow money for current agricultural purposes such as the raising of crops or the fattening of cattle. Those farmers who form a production-credit association must subscribe for stock in it, the amount depending on the size of their individual loans.

Home owners' loan corporation.

A word should also be said concerning the home owner's loan corporation which was established to assist the owners of heavily mortgaged homes, particularly in towns and cities, by giving government-guaranteed bonds to the mortgage holders in exchange for these mortgages and then dealing leniently with the debtors. The corporation has now ceased its active lending operations and is engaged in administering the many millions of mortgage obligations which it has acquired.

The export-import banks.

Likewise, in 1934, the federal government established two export-import banks, incorporated in the District of Columbia, with capital supplied by the United States. The purpose of these banks is "to aid in financing and to facilitate exports and imports and the exchange of commodities between the United States and other nations." To this end the two banks are empowered to do a general banking business (except that of discount and circulation), to receive deposits, buy and sell bills of exchange and other negotiable paper, borrow and lend money, and so on.

Other federal agencies of credit.

Nor is this all. Federal savings and loan associations have been established under the authority of the national laws and are operated by local boards of directors under the supervision of the federal home loan bank board. Their purpose is to lend money on mortgages. Deposits in these banks are insured by a federal savings and loan insurance corporation which should not be confused with a somewhat similar corporation that serves the national and state banks. Deposits in building and loan associations, organized under state laws, may also be insured. It should be

pointed out, however, that the insurance of deposits by the federal savings and loan insurance corporation does not constitute a government guarantee but merely a guarantee by an agency which the government has established.

The system of housing credit.

A concluding word should also be said with reference to credit facilities provided through the regular banks by the federal housing administration. The latter does not lend money but insures lending institutions against losses which they may incur by making approved loans for the modernizing, repairing, or equipping of buildings. The insurance in such cases is up to twenty per cent of the aggregate amount of such loans made by any lending institution. Long-term mortgage loans, if approved, may be insured to full amount under a mutual mortgage insurance fund arrangement which is provided by the national housing act.

The postal savings system.

Incidental mention should also be made of the postal savings system. Under authority of Congress the postmaster-general is allowed to designate post offices as savings depositaries. Such offices may receive deposits up to $2,500 from any individual and these deposits are then invested in government bonds. The aggregate amount is now over a billion dollars. Proposals have been put forward to authorize the loaning of this money to private borrowers but Congress has not favored this innovation.

A highly complex system of credit and banking.

From all this it will be observed that the banking and credit system of the United States is exceedingly complicated. It is more complex than any other in the world. Very few students of American government try to understand it because they assume that banking and credit are matters of economics, not of political science. In a sense that is true, but the control of currency, banking, and credit (and through them the control of prices) is one of the most important functions that any government is nowadays called upon to perform. In the United States it has become primarily a function of the federal authorities, although the states still retain the right to charter and supervise state banks, trust companies, savings banks, coöperative banks, building and loan associations, and various other agencies of credit. Other countries have only one, or at most two or three types of banking and credit institutions; in the United States there are at least a dozen varieties with functions and limitations which defy concise description. One of the country's most urgent needs is a simplified and integrated system of business credit.

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CHAPTER XXIII

THE REGULATION OF COMMERCE

Much humble wealth makes rich this world of ours. — *Leigh Hunt.*

The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares. — *Alexander Hamilton.*

Commercial chaos before the formation of the Union.

The chaotic condition of American commerce during the years preceding 1787 did more than anything else to bring the states together. Immediately after the close of the Revolutionary War the various states began to set up tariffs against one another and to seek preferential trading arrangements with foreign countries. This commercial rivalry soon led to bad feeling. Within a few years it was clear to everyone that the orderly expansion of trade among the thirteen commonwealths and with foreign nations could not be secured except by establishing a strong hand to enforce uniform regulations. On many other things the delegates at the constitutional convention differed widely, but on the necessity of regulating commerce they were virtually unanimous.

What the constitution gives to Congress in the way of powers over commerce.

The constitution, therefore, gives Congress complete power to regulate commerce with foreign nations and among the several states, but subject to the proviso that such regulation shall not give to one state any preference over another, and that no export duties may be levied.[1] These provisions are deceptively simple on their face; in reality they have become, in their application to present-day business activities, more difficult to define than any other powers granted in the constitution. No grant of power to the central government has been of more far-reaching importance than the authority which is embodied in the phrase

[1] The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. (Article I, Section 8.)

No tax or duty shall be laid on articles exported from any state. (Article I, Section 9.)

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another. (Article I, Section 9.)

"to regulate commerce." These three words have made Congress a dominating force in the industrial life of the nation.

The first landmark in this expansion: Gibbons *v.* Ogden (1824).

Of course no member of the constitutional convention, howsoever far visioned, could have had any idea of the vast potentialities which lay concealed in the commerce power of Congress, nor did the full import of this authority begin to be realized until a generation after the Union was established. The decision of the Supreme Court in the case of Gibbons *v.* Ogden (1824) first brought home to the states the extent of the jurisdiction which they had handed over to Congress, and from that time forward the commerce clause has been steadily widened by the inclusion of one thing after another.[1] In a hundred and fifty years it has moved all the way from pack-horse to airplane and from post-rider to radio.

An example of verbal elasticity.

Words are the soul's ambassadors. When used in a constitution they have organic properties. Their shadings keep step with social and economic changes; they expand to cover the necessities of each new age; they signify one thing in this generation and another in the next. The word "commerce" provides an interesting example of this verbal elasticity. When the railroad came it was held to be an instrumentality of commerce. Then the telegraph arrived and was put into the same category. The telephone followed it there. So did the broadcasting station when it came. Meanwhile the courts were busy deciding that express companies, Pullman car companies, electric trolleys, auto stages, airplanes, pipe lines, and a dozen other instrumentalities of American business belonged within the same compendious classification. Those who deplore the cold rigidity of constitutions should learn that legal terminology is not made of vanadium steel. In the hands of a court it has more resiliency than a toy balloon.

The Commerce Power in General

Exact definition of the commerce power is impossible.

So what is commerce? The Supreme Court has never ventured to define it precisely, or to say just what it includes. And wisely so, for a definition of commerce today would be out-of-date a few years hence. One cannot give exact definition to anything that changes with the technique of transportation so rapidly as commerce does. But in a general way it includes all forms of transpor-

[1] In Gibbons *v.* Ogden (9 Wheaton, 1) it was held that Congress had power to maintain the free flow of foreign and interstate commerce even within the boundaries of the individual states themselves.

tation on land, by water, or through the air, the movement of persons, merchandise, and messages,—in fact it covers pretty much the entire field of economic intercourse.

And what it is not.

But there are some specific things which the Supreme Court has excluded from the term commerce. Traffic in bills of exchange, and the selling of insurance policies, for example, have been held to be outside the scope of the term. A baseball team playing games in different states is not engaged in interstate commerce, but a high-tension power line carrying electric current across a state boundary comes under the commerce power of Congress. The line of demarcation is sometimes so tortuous that the average layman cannot follow it. Several years ago the Supreme Court held that a law passed by Congress for the protection of migratory birds was unconstitutional because bird-migrations are not incidents of commerce. But the passing motorist who picks up a hitch-hiker and carries him across the line has been held by judicial ruling to be a carrier of interstate commerce.

So not everything that looks like commerce turns out to be so. In general, however, the term excludes the ordinary operations of agriculture, mining, forestry, or manufacturing. Broadly speaking, the courts have held that the power to regulate interstate commerce gives Congress no authority to determine the conditions of employment in factories.[1] But even here there is a tendency to widen the scope of congressional jurisdiction. The national industrial recovery act of 1933 undertook to regulate maximum hours, minimum wages, and collective bargaining in industries operating wholly within the confines of a single state. That action was clearly outside the scope of the federal government's power to regulate *interstate* commerce in spite of the contention that business which is wholly within a state has an incidental effect upon interstate commerce and hence comes within the implied power of Congress to regulate. The Supreme Court in the Schechter Case unanimously declared the national industrial recovery act unconstitutional on this, as well as on other grounds.[2]

But when one says that manufacturing is not commerce this does not mean that the processes and incidents of manufacture cannot be in any way controlled by the federal government. Most

[1] To avoid a multiplicity of references to the decisions it may be stated that the cases covering these various points may be found in J. P. Hall, *Cases on Constitutional Law* (new edition, St. Paul, 1926).

[2] See *below*, pp. 441–442.

The relation of manufacturing to federal control.

large industries must go afield for their raw materials and for markets in which to sell their products. They buy raw materials in one state, make them up in another, and sell the finished products in several more. In such cases their import of materials and their export of products fall within the scope of commerce. It is obvious, of course, that the processes of industry must depend to some extent upon the regulations under which this interstate buying and selling goes on. But the extent to which Congress may make such regulations is not yet very clear. Some years ago it was assumed, for example, that Congress might prohibit interstate trade in goods made by child labor. But the Supreme Court decided in 1918 that an act of Congress which prohibited such trading was unconstitutional, being an interference in matters which belonged to the states alone.[1]

The child labor decision (1918).

The further decision of 1922.

Having failed in the effort to put an end to child labor by the exercise of its commerce power, Congress tried another method. In 1919 it imposed a special excise tax of ten per cent on the net profits of any establishment employing children under fourteen years of age. This, of course, was merely an attempt to regulate the conditions of employment by means of the *taxing* rather than the *commerce* power. It was not revenue that Congress wanted, but the extirpation of an industrial abuse. The Supreme Court, in 1922, declared this law to be likewise unconstitutional.[2] It did so because a majority of the justices felt that if Congress were permitted to regulate the conditions of industry by means of its taxing power there would be no end to the scope of its authority in this field. There would be no ultimate control of industry left with the states.

Its relation to an earlier decision in the oleomargarine case.

This second child labor decision, which was rendered by a five-to-four vote of the justices, drew a good deal of criticism upon the Supreme Court. It seemed to many people that the great tribunal was standing in the way of humanitarian progress. Some years before it had upheld an act of Congress which placed an excise tax on the manufacture of oleomargarine when colored to resemble butter. The main purpose of this law was not to get revenue but to protect the farmers against competition. The tax was so heavy as virtually to prohibit the further manufacture of the product in question. But the court declared in this case that it could

[1] Hammer *v.* Dagenhart, 247 U. S. 251 (1918).
[2] Bailey *v.* Drexel Furniture Co., 259 U. S. 20 (1922).

not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." Therefore, it went on to say, it could find no merit in the argument that the purpose of Congress in levying this tax was to suppress the manufacture of oleomargarine and not to raise revenue.[1]

Are these two decisions reconcilable?

Many people, even good lawyers, could not see any vital distinction between the power to prohibit the manufacture of colored oleomargarine by taxing it, and the power to prohibit child labor by taxing the net profits of those employing it. But the court made a distinction; it upheld the one and did not uphold the other.

> "Grant the validity of this law," said the court, "and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction over which the states have never parted with, and which are reserved to them by the tenth amendment, would be to enact a detailed measure of complete regulation and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."[2]

The far-flung boundaries of the commerce power.

Commerce is commerce no matter how it is carried on. The method of transportation is immaterial. Nor is it necessary that the carrying be for profit. The presence or absence of buying or selling, profit or loss, payment or gift, does not affect the fundamental fact of intercourse which is the earmark of commerce. The radio broadcaster, although he may never move from one spot, is engaged in interstate commerce. What he sends through the air is a medley of advertising and entertainment. Both are lumped together as commerce.

When commerce becomes "interstate."

But presently another question arises. At what point does commerce become "commerce with foreign nations or among the several states"? The division of power between the federal and state governments on this point is now fairly well settled, although it is by no means a logical division. All commerce which begins and ends within the bounds of a single state is held to be *intrastate* commerce and the state alone can deal with it.[3] But if at any point between its start and its destination the traffic passes outside the state boundaries, no matter for how short a distance, the

[1] McCray *v.* United States, 195 U. S. 27 (1904).

[2] Bailey *v.* Drexel Furniture Co. (see *above*).

[3] For an exception to this general rule, in the case of railroad rate regulation, see p. 423.

whole transaction goes out of the state's jurisdiction. Goods shipped from Boston to New York are under federal regulation from one place to the other, not merely while crossing the intervening states. But goods passing from Los Angeles to San Francisco, a longer distance, are wholly under state regulation. Interstate commerce begins when the person or shipment with an interstate destination goes aboard the carrier.[1]

In other words, the only way to keep goods from coming under the jurisdiction of Congress is to keep them at home, in the state where they are produced. Under present-day conditions of industry that is almost impossible. Every large concern ships goods by parcel post, express, freight train, motor truck, or airplane into other states. Even after reaching its destination, moreover, a consignment of merchandise which has been shipped in interstate commerce remains subject to federal jurisdiction until it is sold in the original package or until this original package is broken.[2]

Limitations on the power of Congress to regulate foreign commerce.

Having pointed out the extent of the commerce power possessed by Congress, it remains to indicate more specifically the limitations placed by the constitution upon the exercise of this authority. As already stated, when Congress undertakes to regulate foreign commerce, it must do so uniformly. It cannot discriminate in favor of one section of the country, or in favor of one part of the population as against any other. If it imposes duties upon imports coming into the United States from foreign lands, those duties must be levied at the same rate at all ports to which the goods may come. The same rules must determine the method of valuing the goods, collecting the duties, giving refunds, and so on. Congress must regulate with an even hand. There must be no sectional partiality or discrimination. So long as it observes the rule of uniformity, however, Congress may determine the conditions under which foreign goods are imported and may even place an embargo on the importation of any kind of merchandise.

The Tariff

The power to regulate commerce with foreign nations has been exercised, in the main, by the enactment of tariff laws. Strictly speaking, a tariff *for revenue* is an exercise of the taxing power,

[1] Pennsylvania R. R. Co. *v.* Knight, 192 U. S. 21 (1904).

[2] See the decision in Leisy *v.* Hardin, commonly known as the Original Package Decision, 135 U. S. 100 (1890).

while a tariff *for protection* falls within the scope of the commerce power. The distinction is of no legal importance, however, for nearly every American tariff during the past half-century has been both fiscal and protective. Nowadays the element of protection predominates and that is why the topic is considered here rather than under the heading of national taxation, as is the case in most books on American government.

The tariff as an instrument of commercial regulation.

Tariff questions have bulked large in the history of American politics, more so, perhaps, than any other single issue or group of issues.[1] The prevailing opinion in the thirteen states at the close of the Revolutionary War leaned towards free trade. But immediately after the new national government had been established Congress adopted a tariff in which the duties were relatively low although they may be said to mark the beginnings of a protectionist movement which soon gained momentum by reason of Alexander Hamilton's famous *Report on Manufactures* (1791), a document which still ranks as a classic of protectionist literature.

Beginnings of American tariff history.

Hamilton argued for a protective tariff on four grounds,—political, industrial, military, and fiscal. Protection, he claimed, would build up the home market and weld the nation together. Second, it would cause the occupations of the people to become diversified by stimulating a variety of manufactures. Third, it would foster shipbuilding and the rise of other activities which in time of emergency could be utilized for the national defense. And, fourth, it would provide a national revenue without arousing popular resentment.

Hamilton's argument for protection.

During the nineteenth century the tariff had its alternating ups and downs but its general course inclined upward, especially after the Civil War. For a time the Republican party stood for protection while the Democrats advocated a tariff for revenue only; but in recent years both parties have become frankly protectionist. Political history in all countries has demonstrated that the policy of protection is not a suit of armor, to be put on and taken off at will. It is a pigmentation of the skin which cannot be removed.

Nineteenth-century tariffs.

In the enactment of tariff legislation, moreover, the national

[1] For a full narrative see F. W. Taussig, *The Tariff History of the United States* (8th edition, New York, 1931), and Edward Stanwood, *American Tariff Controversies in the Nineteenth Century* (2 vols., Boston, 1903).

The procedure of Congress is not well adapted to tariff-making.

legislature has not shown itself at its best. The machinery of Congress is badly adapted to secure satisfactory results in tariff-making. Tariff measures are initiated by the ways and means committee of the House of Representatives, but lobbyists by the hundred, representing every type of industry, flock to Washington and put pressure on the committeemen. Then, when the committee has finished its draft, the measure is brought into the House where it may be amended in the interest of any proposition that can secure a majority. Having passed the House, the tariff bill goes to the Senate, where the process of amending is continued until the final outcome bears little resemblance to the original.

The usual outcome.

To reconcile the numerous differences which exist between the two chambers a committee of conference is then appointed, and this committee sweats blood for weeks in making the final adjustments. Under this system every tariff, as finally adopted, is bound to be a mosaic of compromises, with no one directly responsible for it and nobody satisfied. On rare occasions, however, this has not been the case. When one political party controls a working majority in both House and Senate, when the leaders are agreed upon what they want, and when they have the support of the President, a tariff bill can be put through Congress in businesslike fashion. But the ordinary vicissitudes of American politics are such that these conditions are very seldom fulfilled.

The travail of getting a tariff enacted is so great that Congress does not tackle the task at frequent intervals. This means that the schedules of customs duties may stand unaltered for several years, while industrial conditions undergo a considerable change meanwhile. Prices may rise in America, for example, or may fall in other countries. This, of course, makes it easier for foreign goods to vault the tariff wall. A depreciation of foreign currencies, in terms of the American dollar, has the same effect. Thus it comes to pass that a tariff which is adequately protective when it is adopted may afford inadequate protection to the American producer a few years later.

The flexible clause.

To meet this situation Congress has inserted in recent tariff laws a so-termed "flexible clause." This provision is based upon the principle that tariff rates ought to be high enough to place American industry on exactly the same footing as foreign industry so far as costs of production are concerned. If the tariff commission finds that the existing rates of duty do not accomplish this, the

President, by proclamation, may raise them.[1] If the rates are higher than need be, he is empowered to lower them. As a matter of fact, however, relatively few changes have been made, either up or down, as a result of this flexible mechanism. Tariff schedules have been too deeply enmeshed in politics to permit their being adjusted, month by month, in accordance with strictly economic considerations.

Importance of this innovation.

Obviously the tariff ought to be taken out of politics. The chief justification of a protective tariff is the desirability of safeguarding one country's standard of living against the competition of other countries in which these standards are lower. Hence the rates of duty on imports should be adjusted to differences in costs of production, and should be no higher than this discrepancy makes essential. In American tariffs, however, very little heed has been paid to this principle. The rates have been fixed by the interplay of political pressure from interested quarters. And it is difficult to prevent this so long as congressmen are importuned by their own districts to see that the local industries are amply protected, whatever else happens. The flexible clause may point the way to an ultimate rationalizing of tariff schedules, but this is hoping for a good deal.

The quota system.

Meanwhile the whole problem of tariff relations between different countries has been complicated by the adoption of the quota system in some of them. When even a high tariff wall does not suffice to keep out certain imports it has become the practice, in some European countries, to set a limit on the total quantity which may be brought in. Above this limit it is not permissible to import the specified goods, even on payment of the tariff duties. This practice makes it possible to exercise an absolute control over importations, quite irrespective of the cost of production or the exchange ratios of the currencies involved. It represents a protective system carried beyond the tariff stage.

No tariff on exports.

Congress is not permitted to impose duties on exports, although it can subsidize exports if it so desires, and on some occasions has done so. Shortly after the armistice of 1918, for example, Congress revived the war finance corporation, one of the various war boards, and empowered it to loan government money to exporters, especially to exporters of agricultural products, thus stimulating Amer-

[1] For the organization and general functions of the United States tariff commission see *above*, pp. 247–248.

ican foreign trade. Again, in 1934, it organized an export-import bank system to facilitate the sale of American farm products in foreign countries.[1] The national government, moreover, may indirectly encourage exports by giving subsidies to American vessels engaged in foreign trade. The merchant marine act of 1920 gave the United States shipping board various powers in this direction.[2]

Immigration

The control of Congress over immigration.

The control of immigration is another important phase of the commerce power. By virtue of its authority to regulate foreign commerce Congress has passed numerous laws relating to the incoming of aliens. These laws prescribe the conditions under which immigrants may enter the United States and exclude some classes of aliens altogether. For example, the federal laws exclude all persons, except those engaged in the various professions, who come to the United States to perform labor under contracts made before their arrival. They also prohibit, with certain exceptions, the entry of Chinese and Japanese. A literacy test has been provided since 1917 for all otherwise eligible immigrants. It requires ability to read some language, not necessarily English. Among those excluded under all circumstances are insane persons, and persons likely to become public burdens, or afflicted with serious physical or mental ailments, as well as polygamists, anarchists, and persons who have been convicted of serious crimes. All aliens who are admitted must pay a head tax.

Who are excluded.

The act of 1924.

After the close of the World War it seemed certain that an avalanche of immigration would descend upon America. From almost everywhere, throughout continental Europe, the stream started to flow across the Atlantic. So Congress busied itself with the preparation of measures which were expected to stem the tide. After an unsatisfactory experiment with stop-gap arrangements the "national origins" immigration law was passed in 1924. Under the terms of this law the total number of immigrants admitted into the United States (except from Canada, Newfoundland, Mexico, and the independent countries of Central and South America, to which the restriction does not apply) is limited to 154,000 per

[1] See *above*, p. 406.

[2] On the matter of subsidies to American merchant vessels and airplane transports see *below*, pp. 430–431.

annum. Within this limit quotas are assigned to the various countries on the principle "that the annual quota of any nationality is a number which bears the same ratio to 154,000 as the number of white inhabitants in continental United States in 1920 having that national origin bears to the total white population of continental United States in 1920." But the minimum quota of any nationality is not to be less than one hundred except in the case of persons ineligible to naturalization such as Chinese and Japanese who are excluded altogether. Filipino emigration now has a maximum of fifty persons per year placed upon it, but this does not include Filipinos emigrating to Hawaii. Determination of national origins in the United States is made by reference to a fixed classification which was worked out from the 1920 census figures.

How the immigration laws were administered.

Under this arrangement Great Britain and Northern Ireland get by far the largest quota, larger than all other countries put together. Germany comes next, and then the Irish Free State. No other country has a quota exceeding ten thousand. Immigration officers are stationed at the various American consulates and a permit must be had before the immigrant sets sail for the United States. Supervision of the whole system is in the hands of the commissioner-general of immigration whose bureau is included in the department of labor. Under the law of 1924 immigration has ceased to be a problem except in some western states where the influx of Mexicans (who are not subject to the quota restriction) has given rise to a demand for the placing of limitations upon such immigrants. On the other hand the exclusion of Japanese immigrants has wounded the national pride of that people and it has been argued that no harm would be done by extending the quota system to Japan inasmuch as this would let in only about one hundred Japanese immigrants per year—not a high price to pay for the removal of a serious international grievance.

Deportations.

Congress may regulate not only the admission but the deportation or expulsion of aliens. Accordingly, it has authorized the commissioner of immigration to deport, even after lawful admission, any alien who tries to foment revolution, or to spread subversive political doctrines, or who is convicted of certain crimes. And, of course, anyone whose entry into the United States is shown to have been unlawful can also be deported. Such deportees are sent back to their own countries. Deportation orders are issued by the immigration authorities, not by the courts, but from such orders

there is a right of appeal to the courts. Ordinarily, however, the courts will not interfere unless the facts alleged as the basis of a deportation order are unsupported by any substantial evidence. The burden of proof is on those who resist deportation, not on those who order it.

Regulation of the Railroads

Methods of regulating interstate commerce.

It is chiefly by means of the tariff and the immigration laws that Congress has exercised its power to regulate commerce with foreign nations. But Congress also regulates commerce among the states and its work in this latter field has been even more important. For example, during the past fifty years or more there has been a steady extension of federal supervision over the railroads, most of which do an interstate business. Prior to 1887 railroad regulation was left to the states, but this arrangement proved ineffective. The states could control railroad rates and service within their own boundaries, but had no jurisdiction over through-traffic. Consequently many abuses developed in the way of discriminations in favor of certain cities as against others, or in favor of large shippers as against smaller ones. Likewise there were discriminations in the matter of service, and sometimes favored shippers were given rebates from the rates fixed in the published schedules. These abuses could not be remedied except by federal regulation and in 1887 Congress took its first step in this direction.

The interstate commerce act of 1887 and subsequent acts.

The interstate commerce act of 1887 laid down a series of regulations which were intended to eliminate the abuses mentioned in the foregoing paragraph. These regulations prohibited discrimination in rates or service; they also forbade rebating, and the practice of "pooling" business to which the railroads had frequently been resorting. The act of 1887 and subsequent statutes established the principle that railway rates must be reasonable and must be publicly announced, after which they must not be raised without the approval of the interstate commerce commission, a body which was established to enforce these various regulations.[1]

Work of the interstate commerce commission.

The functions of the interstate commerce commission include the carrying out of all the federal laws relating to steamship and railroad companies, express and sleeping car companies, motor bus and motor truck concerns, power transmission lines, and oil pipe

[1] For the organization of the interstate commerce commission see *above*, pp. 242-243.

line companies, when engaged in interstate commerce. Its jurisdiction also extends to terminal facilities when used in connection with foreign or interstate trade. The commission may investigate, either upon complaint made to it or on its own initiative, any allegations of overcharge, or faulty service, or discrimination in rates made by all such companies. It is authorized, after proper hearings, to fix the maximum rates or fares, and also to make reasonable rules as to the character of the service. It has various other responsibilities with respect to the issue of securities by corporations engaged in interstate commerce.[1]

The regulation of rates.

As the regulations now stand, all rates charged by carriers in interstate commerce must be approved as fair and reasonable by the commission before being put into effect; there must be no favoritism as between different shippers or patrons, no rebates, and no discriminations against any person or locality. With certain specified exceptions no free transportation may be given; and no railroad is allowed to carry any merchandise which it is itself engaged in producing. An eight-hour day was fixed for all railway employees by the Adamson law of 1916, and all work in excess of this amount must be paid for at overtime rates.

The regulation of service and safety.

Many other regulations apply to companies engaged in interstate commerce. Schedules must be public, kept open to inspection, and must not be changed without due notice to the commission, which may withhold its approval of the changes. The accounts of interstate carrriers must be kept according to methods which the commission prescribes and periodical reports based on this accounting system must be rendered. The interstate commerce commission has functions also with respect to safety-appliances, workmen's compensation, and the maximum hours of employment even at overtime wages. In addition to all these things it was instructed in 1913 to make a physical valuation of all the railroads in order that a more intelligent determination of rates might be made possible, and a few years later the commission was given

[1] The commission did not reach this position without a long and difficult struggle. In early days, when it issued an order, there was no means of enforcement except by applying to the federal courts and frequently the courts declined to intervene. Then, in the late nineties, the Supreme Court ruled that while the commission could declare freight and passenger rates unreasonable it had no authority to impose any definite rate or schedule of rates on a railroad. But Congress presently set out to strengthen the commission by giving it various affirmative powers, especially in the Elkins act of 1903, the Hepburn act of 1906, and the Mann-Elkins act of 1910, as well as by the Transportation act of 1920.

various responsibilities with respect to the consolidation of railway systems.

Rate-fixing and due process of law.

A word should be added concerning the relation between rate-fixing and railroad valuations mentioned in the foregoing paragraph. In brief, the connection between the two is this: The Constitution of the United States (Amendment V) provides that "No person shall be . . . deprived of . . . property without due process of law." [1] And it is the function of the courts to protect individuals and corporations against such deprivations. Accordingly, if any action of an administrative body (such as the interstate commerce commission) appears to involve the denial of a fair return upon a proper valuation of private property, such action can be negatived by the courts. For the denial of a fair return is in effect a deprivation of property, and to make this denial by arbitrary legislative or administrative action is to do it without due process of law.[2]

Determining a fair return.

But what is a fair return? And how is the proper valuation of property to be arrived at? To the first of these questions the Supreme Court has given a very sensible answer, namely, that it is relative to time, place, and circumstance. It may be four, six, or even eight per cent depending on the current rates of interest, the amount of risk taken by those whose money is invested in the property, and various other factors. A fair return is one that is fair in the light of all the circumstances, but each case must stand on its own feet.

The basis of valuations.

The second question, however, has not proved so easy to answer. Is the proper valuation of a railroad to be reckoned at what it originally cost, less an allowance for depreciation? Or what it would cost to reproduce the physical plant at present prices? Or by the amount of money that has been actually invested in it? Or what it would bring at public auction? Appreciating the difficulties raised by these questions, Congress in 1913 directed the interstate commerce commission to make its physical valuation of the railroads by giving "due consideration to all elements of value recognized by the law of the land for rate-making purposes."

The commission launched into this big enterprise and virtually completed it within ten years. The valuations were computed

[1] The fifth amendment is a limitation on the powers of Congress but the provision is also incorporated in the fourteenth amendment as a limitation on the states.

[2] For an explanation of the term "due process of law" see *below*, pp. 480–483.

The O'Fallon Case.

according to a rather complicated formula which did not in all cases use the cost of reproduction at current prices as a factor in the appraisal. Accordingly, when a case involving the issue came before the Supreme Court in 1929, that tribunal ruled (by a five-to-three decision) that "the law of the land" required due consideration of present reproduction costs as one of the factors (although not the only one) in all such valuations.[1] So the problem of getting a satisfactory valuation on which to determine a fair return is still an unsolved one.

The division of authority over commerce between federal and state governments.

Meanwhile it should again be pointed out, even at the risk of undue repetition, that the interstate commerce commission has no general authority over carriers which keep strictly within the bounds of a single state. So far as they are concerned, each state provides its own regulations and its own regulating body, commonly known as a railroad commission or public service board. This division of authority over carriers has been a great source of friction and annoyance to the public and to the companies. Every trunk railroad does both sorts of business, carrying some goods and passengers from one point to another within the same state under state regulations, and other goods and passengers between points in different states under federal regulation.

Matters which the states regulate.

The states, moreover, regulate the organization, the capitalization, and the borrowing powers of these companies (because each obtains its charter from the state and not from the federal authorities), while the nation, through the interstate commerce commission, is usually the deciding factor in determining the revenues and the conditions of service. It even determines, in some cases, the rates charged for strictly local traffic on the ground that a transportation company's schedule of rates is a unit and must be dealt with as a whole. Otherwise unduly low rates within a state would entail unduly high rates for interstate traffic in order to give the railroads a fair return. The Supreme Court has upheld its authority to do this.[2] Thus much confusion has arisen from the endeavor of two authorities to regulate the same rate schedules. Regulation

[1] St. Louis & O'Fallon Railroad Company *v.* United States, 279 U. S. 461 (1929).

[2] Wisconsin *v.* C. B. & Q. R. R., 257 U. S. 563 (1922), commonly known as the Burlington case. In this instance the interstate commerce commission, acting under the transportation act of 1920, ruled that passenger fares should be fixed at more than two cents per mile in order to give the interstate railroads operating in the Wisconsin region an opportunity to earn a fair return as provided in the act. But the legislature of Wisconsin forbade fares of more than two cents per mile on any passenger train operating entirely within the state.

can never be satisfactory until it is placed in a single hand, that is, until some one authority is vested with power to control the organization, borrowing powers, income, rates, service, hours of labor, and every other incident of transportation. All these problems are interwoven and no one of them can be solved without regard to the others.

Federal operation of the railroads in war time.

On December 27, 1917, the President of the United States, by virtue of war powers conferred upon him by Congress, took over the operation of the important railroads, placing them under a director-general named by himself. Congress subsequently provided that the owners of the railroads should be compensated during the period of federal operation by being guaranteed a net income equal to the average net earnings of the three preceding years. For more than a year after the end of hostilities the national government continued to operate the railroads under this arrangement, but in 1920 Congress passed the transportation act under the provisions of which the railroads were restored to private operation.

The transportation act of 1920.

This act introduced some new regulatory features. First, it provided that the interstate commerce commission must fix railroad rates high enough to enable the railroads in each region of the country, under honest, efficient, and economical management, to secure a fair return of from five-and-one-half to six per cent on the aggregate value of their operating properties. Note, however, that the act does not guarantee that a railroad shall earn any return at all; it merely gives the railroads of a given region an opportunity to earn a fair return on actual values under proper management. In the case of an over-capitalized road this does not necessarily mean that it will earn enough to pay dividends. The act further provided that all net profits above the rate of six per cent upon the valuation of railroads, as fixed by the interstate commerce commission, should be subject to partial "recapture," in other words that these surplus earnings would be divided in equal shares between the railroads and the government. The share accruing to each railroad was to be kept as a separate reserve fund until the total amounted to five per cent of the road's valuation after which the excess could be used to help pay dividends or for other current purposes. The share received by the government was to go into a revolving fund for loans to weak railroads. As a matter of fact, however, there was very little recapture of surplus railroad earnings

Its chief provisions:

1. Rates.

because few railroads were able to make more than six per cent on their proper valuation, and Congress repealed this provision in 1933.

A second feature of the transportation act was its provision for the adjustment of labor disputes on interstate railroads. For this purpose a joint board, representing owners, employees, and the public, was set up but this arrangement proved unsatisfactory and in 1926 it was replaced by a different plan. Railroad labor disputes are now adjusted, in the first instance, by the parties directly involved. If this fails, however, the President of the United States is empowered to appoint a special mediation board of five members which may or may not include representatives of the owners and employees. This board, after hearing the issue, makes its recommendation to the President, and public opinion is supposed to do the rest.

2. Labor disputes.

In the third place, the act of 1920 authorized the interstate commerce commission to fix minimum rates as a means of preventing unwise and unprofitable competition among the railroads. This means that the commission now has power to determine both the minimum and the maximum charges in freight and passenger schedules. Likewise, it has authority over what are known as joint rates, that is, the through-rates on shipments over more than a single railroad. In such cases it determines how the proceeds of a joint rate shall be divided among the roads concerned and this division need not be according to the actual mileage involved.

3. Minimum and joint rates.

Finally, the transportation act authorized the consolidation of the railroads into a limited number of great systems. It directed the interstate commerce commission to draw up a plan for such consolidation in the several regions, and empowered it to approve any merging which the railroads might themselves propose in accordance with such a plan. But the act gives the commission no power to compel consolidations and thus far the railroads have not taken the initiative. Nevertheless this feature of the transportation act marked a departure from the traditional policy of Congress which, prior to the war, sought to hinder the railroads from consolidating. The old idea was to encourage competition among them. But the government's experience in managing the railroads during the war showed that unified management could be made to produce economies.

4. Railroad consolidations.

With the onset of the economic depression in 1930 the traffic

The railroads in the depression.

on the railroads underwent a rapid and severe decline. Earnings fell off correspondingly. In no region of the country were they sufficient to produce the fair return on valuations which the act of 1920 contemplated. A general increase in rates, it was felt, would only result in a further decrease of business and hence would not solve the problem. To make matters worse, many railroads found that they could not meet maturing obligations and in some cases they defaulted the interest on their bonds.

The federal coördinator.

To ameliorate this situation two steps were taken. The reconstruction finance corporation made large loans of government money to the most needy railroads, taking such security for these loans as it was able to obtain. Likewise Congress made provision for a federal coördinator of transportation, appointed by the President, with the duty of promoting or requiring economies, eliminating wasteful duplication of services and facilities, securing financial reorganizations, and recommending other measures for improving the stability of the railroads. A significant limitation, however, was the requirement that economies in railroad operating must not be effected by reducing the number of employees.

Railroad pensions.

In 1934 Congress passed a railway pensions act which required all railroads to establish pension funds. The money for these funds was to be obtained by contributions from both railroad owners and employees. But the Supreme Court held the statute to embody an unwarranted extension of congressional authority and hence unconstitutional. Thereupon Congress resorted to a use of its taxing power in an effort to achieve the same end. By a new statute, passed in 1935, a tax is laid on railroads to provide a pension fund for all employees who have reached the age of sixty-five and have completed at least thirty years of service. Whether this act of 1935 is constitutional has not yet been determined.

The present situation.

From no regulation at all, fifty years ago, we have now developed a system of railroad regulation by no fewer than fifty boards, namely, the interstate commerce commission, forty-eight state boards, and a board for the District of Columbia. While the railroads of the United States are ostensibly managed by their private owners, that is, by officials and directors chosen by the stockholders of the railroads, many important questions of railroad policy are now settled by law, or by the rulings of public commissions. Those who own the railroads, and those who manage them for the owners, do not finally decide what rates shall be charged,

what wages shall be paid, what trains shall be run, how many hours a trainman shall work, or how the railroad's accounts shall be kept. When one speaks of economic individualism and laissez-faire in America it is well to remember that so far as the railroads are concerned no such philosophy has been in operation for many years.

Regulation of motor transport.

Meanwhile there has developed a large amount of competition on the part of motor stages and motor trucks. These agencies of transport have some marked advantages over the railroads. They have no expensive rights of way to maintain but use the public thoroughfares. They require no costly terminals, freight yards, or passenger stations. They can pick up their loads at any point and deliver them to the consignee's door. They have been subject to virtually no official regulations as to quality or regularity of service, rates or fares, hours of labor, or minimum wages. This has enabled motor stages and motor trucks to cut heavily into the freight and passenger business of the railroads.

Not until 1935, however, was Congress ready to provide that this form of interstate transportation should be adequately regulated. Opposition to such a move was for several years sufficiently powerful to delay it. But in the end the desirability of regulation became so self-evident that statutory provision was made for bringing interstate motor transportation under the regulatory jurisdiction of the interstate commerce commission. The body has authority over the rates charged and the service given by such carriers with the exception of trucks carrying farm produce and those owned by individuals.

Meanwhile the commission was relieved from some of its former responsibilities. Prior to 1934 the regulation of interstate telephone, telegraph, and of transoceanic cable companies was in its hands, thus giving the commission more than enough to do. To make the regulation of these utilities more effective, therefore, Congress authorized the creation of the federal communications commission in 1934.[1] To this new board was given all the supervisory powers over communication agencies previously exercised by the interstate commerce commission together with the authority over radio and television companies which, since 1927, had been vested in the federal radio commission. Provision was also made for the taking over of all communication agencies in time of war if the President so directs.

[1] For the organization of this commission see *above*, pp. 244–245.

Public Utility Holding Companies

The genesis of holding companies.

During the past fifty years there has been a great development in the field of public utilities. Electric lighting and power companies have been organized to provide services for even the smallest communities. In the earlier stages of this development a great many small companies were organized, each supplying the needs of its own neighborhood. But it was soon found that electric light and power could be produced more cheaply on a large than on a small scale, hence began the process of consolidating the little companies into big ones by purchasing them outright. This consolidation, however, was not relished by the public because it seemed to result in the creating of large monopolistic corporations, and it was frowned upon by state legislatures as well as by regulating commissions in the states. Accordingly resort was had to a new device known as the holding company. Under this arrangement a new corporation was organized with the sole purpose of buying and holding stock in the individual public utility companies. The latter continued to operate but their operations were supervised and controlled by the holding company which owned the stock.

Their merits and defects.

This system had some important economic advantages. It permitted local management of public utility plants to be continued while providing centralized financial backing and technical assistance of a high order. It stimulated small plants to improve their technique and earnings. On the other hand the holding company plan led to many serious abuses. Such companies have no physical assets as a rule but merely own the stock of smaller operating concerns. They sell to the public shares of their own stock based upon this ownership of other stock. In this process a very great and unwarranted inflation of stock issues has been possible. Having control of the operating companies, moreover, the holding company has frequently forced the former into improvident contracts for its own benefit, thus milking the smaller concerns in order to pay dividends upon the inflated stocks of the holding concern. Holding companies chartered in one state, again, frequently own the stock of operating companies which are located in other states, thus rendering state control of the whole financial structure virtually impossible. During the era of speculation, 1922–1929, an enormous amount of holding company stocks were marketed to the investing public at high prices on the basis of fictitious earnings;

then when the business recession came in 1930–1934, the values which were thought to be represented by these investments dwindled in many cases to a small fraction. Consequently a wave of nation-wide resentment against the holding company system was an inevitable result and this public attitude reflected itself in the demand for a congressional investigation.

The public utility holding company act of 1935.

Out of the investigation, which disclosed a series of grave abuses, came the public utility holding company act of 1935. After defining a holding company as "any company which directly or indirectly owns, controls or holds with power to vote, ten per cent or more of the outstanding voting securities of a public utility company" this law requires that all such companies shall be registered with the federal securities and exchange commission.[1] Failing to do so they are forbidden to sell their securities in interstate commerce or make use of the mails in connection with their business. In order to be registered with the commission each holding company must file elaborate information covering all matters relating to its organization and activities; it must also conform to various requirements set forth in the law and must continue such conformance or its registration may be revoked. Strict rules relating to the issue of holding company securities are provided and it is the commission's function to see that these are enforced. Likewise it is the duty of the commission to examine the structure and activities of every registered holding company, in order to determine whether these can be simplified, with power to require such simplification, even to the extent of virtually eliminating those holding companies which seem to be unnecessary to the operations of an integrated public utility system.

Its complexity.

The act of 1935, as passed by Congress, is a document of over twenty thousand words. Obviously it is impossible, in this brief discussion, to give even a summary of its numerous, varied, and often highly technical provisions. These provisions, however, relate to such matters as contracts between holding companies and their operating subsidiaries, inter-company loans, dividends, security transactions, sale of utility assets, the use of proxies at meetings, accounts and records, advertising, the eligibility and obligations of officers and directors, and the machinery for enforcing the law. Some of these provisions seem unduly drastic and go a good deal farther than the correction of abuses. Much will depend,

[1] See *above*, pp. 245–246.

however, upon the spirit in which the law is administered. It represents, in any event, a notable extension of the federal government's regulating power under the commerce clause of the constitution,—assuming, of course, that the act will be upheld, which is not a certainty until the Supreme Court has passed upon it.

Promotional Activities

The promotion of commerce.

What has been said in the foregoing pages has reference chiefly to the regulatory work of the national government in the domain of foreign and interstate commerce. But not all the work of the federal authorities in this field is of a regulatory character. Much of it, on the contrary, is promotional and constructive. It aims to develop and expand the commerce of the United States both at home and abroad. It is concerned, for example, with the development of the American merchant marine and the provision of adequate aids to navigation, the exploitation of foreign markets, the compilation of trade statistics for the information of importers and exporters, the encouragement of air transportation, and the establishment of landing fields.

National control of all navigable waters.

The Constitution of the United States not only gives Congress power to regulate foreign and interstate commerce but it likewise declares that the judicial power of the national government shall extend to "all cases of admiralty and maritime jurisdiction." [1] Because of this latter provision the Supreme Court has held that the paramount authority of the federal government does not depend upon the question whether a vessel is engaged in foreign or interstate commerce but extends to all voyages which are maritime in character and on navigable waters, even if made wholly within a single state—for example, a voyage between Rochester and Buffalo or between Cleveland and Toledo.[2] All navigable waters within the United States are under federal control and much attention has been given by Congress to the improvement of rivers, lakes, and harbors in order that commerce may be facilitated. On many occasions a "rivers and harbors bill," carrying large appropriations for this purpose, has been passed, but unfortunately much of the money has been frittered away on minor projects which have only a very slight relation to the upbuilding of trade.

In order that a country may build up a profitable trade, both

[1] Article III, Section 2.
[2] The Lottawanna, 21 Wallace, 558 (1874).

with foreign lands and between different parts of its own territory, it needs vessels of its own. Commerce that depends on the use of alien vessels is insecure because the outbreak of war between two foreign countries may keep these ships at home. Consequently it has been the policy of the United States to encourage the upbuilding of an American merchant marine. Ever since the Revolution there has been such a fleet but from time to time it has varied greatly in size. Different methods of encouragement have been used. One of them is the restriction of all trade between American ports to vessels of American registry. No foreign vessel is permitted to carry passengers or freight directly from one American port to another. Sometimes actual subsidies are also given to American companies engaged in foreign trade, usually under color of lucrative payments for the carrying of mail. During the World War, moreover, a large number of vessels were constructed by the government as a public enterprise and for a time after the war these ships were operated by the United States shipping board, but ultimately most of them were sold to private companies.

The merchant marine.

The federal laws contain many provisions relating to the management of American merchant vessels, particularly in the interest of safety and for the protection of seamen.[1] These rules are enforced by the steamboat inspection service. Aids to navigation are also maintained by the federal government, including lighthouses, buoys, landmarks, lifesaving stations, radio-beam stations, and coast patrols. The national government also makes surveys of the coasts and provides charts for the use of navigators. Mention should also be made of the greatest enterprise ever undertaken by any country for the promotion of its own maritime commerce, namely, the building and maintenance of the Panama Canal.

Safety and supervision.

The national government, during the past twenty years, has also been spending large sums of money, in coöperation with the states, for the building of motor highways. This has resulted in the construction of a national highway system over which a large part of the inland commerce in passengers and freight is now being carried by motor vehicles. In 1926 the department of commerce was authorized by Congress to promote transportation by air. Accordingly it has assumed the duty of examining and licensing aircraft and pilots, conducting research on air navigation problems, and

Highways and other facilities for inland trade.

[1] For example, the La Follette seamen's act of 1915 and the merchant marine act of 1920.

providing information on civil aviation. By liberal subsidies to private companies for the carrying of air mail, moreover, new routes have been opened and maintained.

The development of markets abroad and at home.

The progress of commerce depends not only on ships and railroads, motor trucks and airplanes, but upon the possession of accurate knowledge concerning markets, prices, and business opportunities. In foreign countries this data is gathered by American consuls and by commercial attachés who are stationed at American embassies abroad. To assist in the development of domestic trade the federal government maintains offices (under the supervision of the department of commerce) in all the principal cities of the United States. Their function is to coöperate with local business organizations such as chambers of commerce and boards of trade in the development of home markets for American products. During the ten years following the close of the World War great efforts were made to build up foreign commerce, but of late more attention has been directed to the cultivation of trade within the nation itself.

What is the wise policy?

This raises an important question of public policy. Should the United States follow the example of Great Britain in the nineteenth century, and of Japan in the twentieth, by trying to build up a huge trade with other parts of the world? Or should the efforts of the national government be concentrated on the home market of nearly a hundred and thirty million people with the idea of having them use all the commodities which are produced in the United States? It has been forcefully argued that the upbuilding of a large foreign trade necessitates naval expansion as a means of safeguarding it and eventually draws the nation into political entanglements which not infrequently lead to war. Likewise it places a country's economic system on an insecure basis because in the vicissitudes of international politics the foreign trade may suddenly be cut off, thus precipitating a serious industrial depression. On the other hand America produces a large surplus of grain, meat, cotton, and other products of the soil which cannot be profitably marketed at home, and American industries are equipped to supply more goods than the domestic demand can utilize. Similarly there are many things, such as sugar, tea, coffee, rubber, silk, and bananas which cannot be produced in sufficient quantities here and must be imported. Attempts have been made, with rather indifferent success, to negotiate commercial treaties

whereby an exchange of products would be arranged on a mutually agreeable basis. The question whether the United States should attempt to capture a sizable fraction of the world's commerce or should be content with a national self-sufficiency is one that will have to be answered within a few years.[1]

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CHAPTER XXIV

INDUSTRY, AGRICULTURE, AND LABOR

All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people.—*John Stuart Mill.*

Commerce and industry distinguished.

It is difficult to draw a sharp dividing line between commerce and industry. Generally speaking, however, industry produces and commerce distributes. One is an instrumentality of production while the other is part of the mechanism of exchange. The two, however, are interdependent, for industry on a large scale cannot exist without commerce to market its products, while commerce without industry would be even less fortunately situated. In the United States both have developed together. Handicraft industries have expanded into huge manufacturing plants which send their products into the commerce of the nation and throughout the world. Hand-in-hand with this has come the rise of great industrial corporations, owned by thousands of stockholders but managed by small groups whose responsibility to these owners is neither direct nor definite. For a long time it was assumed that competition among these industries would serve as an automatic protection against high prices, but this did not prove to be the case. Frequently the large industrial corporations, instead of entering into vigorous competition with one another, formed trusts or combinations to restrain trade and stifle competition for their own profit.[1]

The Control of Industrial Corporations

Although the evils resulting from these combinations were widely recognized for many years, Congress refrained from any serious attempt to provide a remedy until 1890. The whole problem was left to the states, which, in somewhat intermittent fashion, tried to enforce the old principle of the common law that all combinations which *unreasonably* restrain trade are illegal and may be dissolved.

[1] They have been called trusts because a common way of creating a combination was by vesting the stock of several companies in the hands of trustees. These trustees, in possession of the stock, had power to elect the directors of the several companies and to dictate a common policy for them all.

But this desultory work of the states became less effective as the industries broadened their scope. Spreading over several states they were able to evade regulation by any of them. In the end some of them were able to crush out their weaker competitors, raise prices, and establish a virtual monopoly in their own lines of business.

The Sherman anti-trust law of 1890.

To cope with this problem Congress in 1890 enacted the Sherman anti-trust act, the first provision of which was as follows:

> "Every contract, or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

This paragraph, it will be noted, makes no distinction between combinations which are unreasonable and those which are not. Going further than the common law it prohibited all combinations in restraint of trade, whatever their nature or merits. Not only that but it provided for the criminal prosecution of any one violating the act, and even for the confiscation of such property as was concerned in the unlawful conspiracy. The Sherman law had plenty of teeth in it.

Its early history.

But no law, however drastic its provisions, is worth much unless machinery is established for enforcing it. And none was provided in this case. Congress merely assumed that the attorney-general of the United States would attend to the enforcement of this as of other federal laws. The attorney-general's office had other things to do, however, and after an ineffectual attempt to enforce the law in one case the Sherman law virtually was permitted to go to sleep on the statute-book.[1] Then President Theodore Roosevelt, on his accession to office in 1901, decided to get after the trusts, and as a first step persuaded Congress to create a bureau of corporations with the function of investigating violations of the law. Armed with facts which this new bureau provided he thereupon instructed the attorney-general to begin prosecutions and some of these were carried to a successful outcome.

In 1904, for example, the Supreme Court rendered its decision in the Northern Securities Case,[2] followed seven years later by

[1] United States *v.* E. C. Knight Co., 156 U. S. 1 (1895). This was a case against certain sugar refineries in Pennsylvania which had combined. The Supreme Court held that the combination was not shown to be engaged in interstate commerce and hence that the Sherman act did not apply.

[2] Northern Securities Co. *v.* U. S., 193 U. S. 197 (1904).

similar rulings, notably in the Standard Oil Company's Case and the American Tobacco Company's Case.[1] All these decisions held that the concerns in question were combinations in restraint of trade and ordered their dissolution. In rendering its decision in one of the later cases, however, the Supreme Court explained that the mere existence of an industrial combination did not render it illegal, but that every such combination had to be adjudged in accordance with its real purpose. So although the court held these particular concerns to be illegal, it served notice that combinations would not be ordered to dissolve for the mere reason that they happened to restrain trade but only when it appeared that they were able and ready to restrain trade unreasonably. In other words, the Supreme Court read into the opening provision of the Sherman law something that Congress had left out, and its dictum passed into popular discussion as "the rule of reason."

The anti-trust decisions.

Not every combination of industries is harmful. There are "good trusts and bad trusts" as Theodore Roosevelt once said. Strenuous industrial competition is not an unmixed blessing. Sometimes it involves a cutting of prices below the profit point and entails a reduction in wages as well. Free and unrestrained competition has often turned out to be a form of economic wastefulness from which the public gains nothing in the end.[2] When the national government in 1917 took over the operation of the railroads, for example, it at once proceeded to do on a huge scale what it had always prevented the railroads themselves from doing. It put everything under central control, eliminated duplications in service, abolished competition in rates, and operated every mile of trackage as part of one giant transportation monopoly. Great savings in the operation of the railroads were made in this way, thus demonstrating that there are times when more can be accomplished by the elimination of competition than by the compulsory fomenting of it.[3] Administrative supervision such as is exercised by the interstate commerce commission and the federal communications commission is more salutary from the public point of view than the sweeping provisions of law can hope to be.

Merits and defects of the anti-trust law.

[1] 221 U. S. 1 (1911), and 221 U. S. 106 (1911).

[2] Realizing the handicap which the Sherman law imposed upon concerns which were engaged solely in foreign trade, Congress in 1918 passed the Webb-Kenyon act exempting such concerns from the rule against combinations.

[3] These economies were offset, however, by increases in the number of employees, the rate of wages, and the allowances for overtime work. Consequently the government's operation of the railroads resulted in a heavy deficit.

The Clayton act (1914) and the federal trade commission.

Meanwhile, in 1914, Congress enacted the Clayton act and the federal trade commission act which, although they did not repeal the Sherman law, placed the whole matter of industrial regulation on a simpler and saner basis. This legislation recognized that there were many business abuses, other than those resulting from monopoly, which ought to be eradicated,—unfair competition and deceptive advertising, for example. In addition to forbidding these practices, therefore, the laws provided for an enforcing body known as the federal trade commission.[1] This board took over the work formerly done by the bureau of corporations in the department of commerce and assumed many new duties as well. The functions of the federal trade commission are twofold, legal and economic. In the first place it is charged with the duty of enforcing the laws against any combination which, in its judgment, is unreasonably restraining interstate trade. Likewise it is responsible for the enforcement of the laws which prohibit interlocking directorates among large industrial corporations. The Clayton act declared all "unfair methods of competition" in interstate commerce to be unlawful and the federal trade commission has the duty of enforcing this provision. Tying-contracts, so-called, are an example, that is, contracts which require a merchant to buy exclusively from some one dealer. And all forms of misrepresentation with respect to the quality or properties of merchandise come within the category of unfair practices.

The commission's procedure.

Before the federal trade commission was established it was possible for misrepresentation to be made the basis of prosecution in court. But this remedy was slow and costly. Now all that need be done is to file a protest with the commission, stating the facts. Thereupon a preliminary investigation is made. If the commission finds that the protest seems to have an adequate basis it cites the offending individual or corporation to appear and explain. Then if the explanation is not satisfactory it issues an order to "cease and desist," in other words to discontinue immediately the practice which was the basis of the complaint. The first step in the exercise of its enforcement authority is to issue such an order. If this order is not obeyed the commission can bring the offending individual or corporation into the federal courts. On the other hand, those against whom an order is issued have a right of judicial appeal.

The economic powers of the commission include the right to

[1] For the organization of the federal trade commission see *above*, pp. 243–244.

investigate the business methods and practices of industrial and mercantile concerns engaged in foreign or interstate commerce. To this end it has authority to summon anyone before it and to compel the production of business records. On the basis of its investigations the commission makes a report to Congress from time to time, and these recommendations sometimes lead to the enactment of additional regulatory laws. Likewise the federal trade commission has worked out lists of unethical methods in different forms of business and in many instances has been able to secure the elimination of these practices through the voluntary coöperation of the business men concerned.[1] The commission functions as an umpire to secure fair play and an observance of the rules by business concerns. By its active efforts the general standards of American business have been notably improved during the past twenty years. It should be emphasized, however, that the commission's work relates only to business that is done on an interstate scale. It has no jurisdiction over purely local industries.

Scope of its work.

With the beginning of the depression in 1930 a good deal of unfair competition in industry recommenced. Prices fell rapidly; workers were discharged in large numbers; those who remained at work had their wages reduced; many industrial plants were shut down altogether while others operated on a part-time basis; and a price-cutting competition was virtually forced on many industries in the effort to keep themselves going at all. Here was a problem calling for governmental intervention from a new angle. Traditionally the public authorities had made it their business to foster industrial competition. For a generation they had been trying to curb monopolies, trusts, and all other practices in restraint of trade. Now it appeared that competitive rivalry was being carried too far. Left unchecked there would be a general lowering of wages and a reduced standard of living in the country as a whole.

A new problem arises.

The National Industrial Recovery Program

In an effort to check the downward march of prices and wages due to this emergency competition Congress in 1933 passed the national industrial recovery act. Its principal aims were to eliminate child labor, secure the maintenance of minimum wages,

The national industrial recovery act: its purposes.

[1] Such unethical methods include the deceitful imitation of trade-marks and labels, the ambiguous branding of merchandise, and the circulation of false reports about competitors.

shorten the hours of weekly work and thus spread employment, promote the practice of collective bargaining by workers, prevent unfair practices in business, increase the purchasing power of the people, encourage more planning in industry so as to prevent overproduction, and assure to producers a fair price for their goods.

The "codes of fair competition."

To accomplish these ends the President was authorized to set up a national recovery administration. For a time it was headed by a single administrator but subsequently a board was placed in charge of the work. The anti-trust laws were virtually suspended and industries were required to work in unison, not in rivalry. More specifically it was ordered that the various industries of the country should formulate, each for itself, a "code of fair competition" which, after approval by the President of the United States, would have the force of law. In each industry, moreover, this code was to be enforced by a code authority, a board representing employers, workers, and the public. It was further stipulated that no code would be approved unless it provided for the elimination of child labor, the fixing of minimum wages, the establishment of reasonable working hours, and the right of employees to bargain collectively with employers through representatives of their own choosing. Prior to the approving of each code the national recovery officials made provision for public hearings at which all interests were entitled to be represented.

The "blanket code."

But there are several hundred types of industry in the United States. And it soon became apparent that the formulation of codes for all these varied industries, ranging from lumber mills to barber shops, would take many months. Meanwhile the government was desirous of getting quick results, for the unemployment situation had become serious. Accordingly it was decided that the President should call upon all employers, irrespective of their industries, to give their temporary adhesion to a "blanket code" which would serve until regular codes for the individual industries could be framed and approved. This blanket code fixed the maximum hours of daily and weekly work, the minimum wages to be paid, and provided that no person under sixteen years of age should be regularly employed.

Its results.

More than two million employers accepted this temporary code within a few weeks and were given a special insignia (the Blue Eagle) to display in their places of business as a mark of their compliance. In a great many cases their acceptance involved a

reduction in the working-hours of employees, and this, in turn, entailed the taking-on of additional workers. For the moment this helped to reduce unemployment but it also increased the costs of production and the prices of merchandise, whereupon the demand for goods began to fall off. One factor tended to offset the other. The codes, moreover, frequently contained provisions which fixed minimum prices above the previous level and this was naturally unpopular with the consuming public.

The constitutional issues involved:

Meanwhile the constitutionality of the national industrial recovery act was called into question upon two grounds. First was the contention that it went beyond the commerce power of Congress. The framers of the law had sought to bring it within this power by asserting in the preamble that its purpose, among other things, was "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof." Thus they attempted to maintain the proposition that industries operating wholly within the bounds of a single state might be subjected to regulation by Congress if their operations could be held to affect, even in an indirect way, the processes of foreign or interstate commerce. Such a proposition went far beyond anything previously attempted in the way of extending the commerce power of the national government. Even before the constitutional issue had been settled, however, it became apparent that the enforcement of codes for all industries, big and little, from automobile factories and textile mills to clothes-pressing establishments and beauty parlors, would be an impossible task. On the recommendation of the President, therefore, Congress in 1935 amended the national industrial recovery act in such way as to confine its codes of fair competition to industries actually engaged in interstate business, in other words to the large industries. Likewise it placed a time-limit on the duration of the law.

1. The power of Congress to control all industry.

2. The delegation of legislative functions.

The other ground upon which the NRA was attacked had to do with its delegation of legislative power to the executive branch of the government. In passing the law Congress gave the President an unprecedented range of power over industries. It placed in his hands the right to approve codes which, upon his approval, became the law of the land. This, it was contended, involved an abdication by Congress of its lawmaking authority. Industries, with the approval of the executive, were empowered to make rules, with the force of law, fixing hours, wages, prices, and conditions

of work. The constitution provides that "all legislative power herein granted" shall be vested in Congress, and the contention was that Congress could not delegate this authority to anyone.

The Supreme Court's decision.

The Supreme Court in the Schechter Case (1935) unanimously declared the national industrial recovery act unconstitutional on both grounds.[1] It ruled that Congress had no power to regulate industries which did business wholly within the bounds of a single state. It rejected the proposition that such business could be brought under federal regulation for the mere reason that it might, in an indirect and incidental way, affect or obstruct the free flow of interstate commerce. Likewise the court held that the recovery act represented a delegation by Congress of legislative powers which, under the constitution, could not be exercised except directly. This decision, made unanimously and in unequivocal terms, reaffirmed the principle that while the provisions of the constitution will be interpreted in a liberal spirit, as respects the commerce-regulating power of the national government, there is a limit beyond which this liberality cannot be carried.

The Guffey coal act.

Having thus encountered constitutional difficulties in the attempt to place all industries under codes of fair competition, the national government turned its attention to the possibility of providing supervision for some of the basic industries one by one, particularly those closely concerned with natural resources. Congress made a beginning in this direction by passing the Guffey coal act (1935). This measure undertakes to regulate the conditions under which coal may be mined for shipment in interstate commerce. Among other things it guarantees to workers engaged in this industry the right of collective bargaining. At the time when this measure was before Congress there was serious doubt as to its constitutionality in that it undertakes to control conditions of industry within a state on the assumption that the subsequent shipment of the product in interstate commerce gives it such power. This issue will presently have to be decided by the courts.

Industrial and Social Security

A lesson from the industrial setback.

In a message which he sent to Congress during the summer of 1934 President Franklin Roosevelt called attention to the need of federal legislation to promote industrial and social security in the United States. It is one of the lessons of economic history that

[1] See *above*, p. 78.

recessions in industry and employment will come from time to time. That being the case it is desirable to make such provision as will prevent the unemployed, in these eras of economic depression, from becoming a heavy and unprepared-for burden upon the public treasury. Likewise it is a well-recognized social fact that many thousands of industrial workers, when they reach an advanced age and are no longer able to work, find themselves without means of support and have to be assisted by private or public agencies. European countries have made provision for the support of superannuated workers by systems of old age pensions, but not until 1934 did the government of the United States undertake such a project on a nation-wide basis.

The social security act of 1935.

As a first step in the framing of a program the President appointed a committee on economic security which in due course submitted an elaborate report with some definite recommendations. These were then embodied into a measure which Congress enacted as the social security act of 1935. In this measure provision is made for the administration of the whole system by a social security board of three members appointed by the President for terms of six years. The board is made a part of the department of labor but is expected to assume a large measure of independence in its work. The law requires that members of the board shall engage in no other business, vocation, or employment during their terms of service.

The old age pension system:

Two classes of persons are involved in the old age pension problem. The first are those who are already advanced in years or who are nearing the age at which they can no longer hope to support themselves by labor. The second class includes the young and active, those in the twenties and thirties, for whom ultimate provision can be made through the contributions of industry over a period of years. As respects the first category the act of 1935 sets up a nation-wide system of old age pensions to be directly administered and financed in part by the states. The federal government offers to match payments made by the states to needy persons, sixty-five years of age or more, up to fifteen dollars a month per person. In addition it agrees to contribute five per cent of its total grant towards the administrative expenses of the system. It should be noted, therefore, that the social security act is based upon the expectation that each state will set up its own old age pension system, paying to each qualified person whatever allowance it

1. Provision for those at or near the pension age.

sees fit. The national government merely contributes half the cost of such payments up to a maximum of fifteen dollars a month. There is no basis, therefore, for the common impression that thirty dollars a month is the maximum that can be paid. A state may pay old age pensions of twice that amount, if it chooses, but the federal government's contribution is limited to the monthly grant-in-aid of fifteen dollars. The balance must be financed by the states themselves. The federal government's contribution, moreover, hinges upon the fulfillment of certain conditions. Before a state can obtain its federal grant-in-aid it must adopt a state-wide plan of old age pensions, must establish a state agency to administer it, and must work out a method of administration which the federal board approves.

2. For the younger workers.

As respects the providing of old age pensions for those who are not now approaching the eligible limit, provision is made to liquidate the ultimate burden by the contributions of such workers during their active working years. To this end it is arranged that persons in all employments, other than those which are specifically excepted,[1] shall have a certain percentage of their wages or salaries paid by their employers. These contributions are to be invested in bonds issued by or guaranteed by the United States. On reaching the age of sixty-five each person for whom the contributions have been made over a term of at least five years will receive an annuity the amount of which is based upon the length of time the contributions have been made and the amount of wages paid to him, but no annuity may exceed eighty-five dollars per month.[2]

Unemployment insurance.

The social security act also provides for a system of unemployment compensation. The federal government agrees to pay to any state which adopts an approved unemployment compensation law "such amounts as the social security board determines to be necessary for the proper administration of such law," provided the total amount of such grants-in-aid does not exceed a designated amount appropriated by Congress. Every non-exempt employer is required to pay a tax with respect to persons in his employ.[3] The tax is one per cent of wages for 1936, two per cent

[1] The excepted classes include agricultural labor, domestic service, casual labor, government employment, and employment by a religious, charitable, financial, or educational institution.

[2] To attain this maximum, service for over forty years at a salary of at least $250 per month would be necessary.

[3] The exemptions are substantially the same as in the case of contributions for

for 1937, and three per cent thereafter. But an employer may credit against this federal tax ninety per cent of the payments which he may have made for the same period into a state unemployment compensation fund provided such state system has been approved by the federal authorities. Various conditions are laid down in the law which must be satisfied in order to obtain this approval. One of them is that all moneys received by the state unemployment compensation fund shall be immediately paid over to the federal treasury. Thus the entire proceeds from the levy upon payrolls will go into an unemployment trust fund, established in the treasury of the United States and invested by the secretary of the treasury in national obligations. From this fund payments of unemployment compensation will be made under conditions set forth in the law. The expectation is that all the states will in due course set up their own systems of unemployment compensation, subject to national supervision, assistance, and investment; likewise that the details of administration will be handled by state agencies.

Other provisions.

In addition to its provisions for old age annuities and unemployment compensation the social security act makes arrangements for federal grants-in-aid to states which have approved plans for the support of dependent children. The approval of such plans is a responsibility of the children's bureau in the department of labor. Federal aid is also provided to the states in connection with maternal and child health service, the care of crippled children, child welfare in general, and vocational rehabilitation. These arrangements, however, are merely a continuation and elaboration of activities in which the federal government has been engaged for a number of years. The act likewise carries an appropriation for assisting the public health work of the states and for helping those states which maintain approved plans of assistance to the needy blind.

Summary.

The social security act of 1935 is one of the most far-reaching statutes ever enacted by Congress. It is based upon the idea that the support of aged workers, and the maintenance of the unemployed, should not be matters of charity or dole-granting, but ought to be regarded as items in industry's costs of production. These charges should be absorbed in the general level of prices.

old age annuities, with the addition of all employers having fewer than four employees.

And with this fundamental economic philosophy no reasonable fault can be found. The present legislation endeavors to place social insurance on what will ultimately be a self-sustaining basis, and to that extent it embodies a sound principle. On the other hand, however, it may properly be criticized in that it leaves large elements of workers out of consideration—farm laborers, for example, and those employed in domestic service, together with all those working in places with fewer than four employees (so far as unemployment compensation is concerned). The reasons for this seem to have been largely political, a disinclination to antagonize the farmer and the great number of small employers. There would seem to be no good reason, moreover, why ordinary workers in scientific and educational institutions (such as janitors, gardeners, library employees, etc.) should be denied the advantages of social insurance. Many practical difficulties are certain to be encountered in the administration of the law and frequent amendments will doubtless be found necessary, if the act is held to be constitutional.

Agricultural Adjustment

The federal government's relation to agriculture.

The Constitution of the United States makes no mention of agriculture, although this was the principal vocation of the people in 1787. It gives the federal government no express powers in relation to agriculture. But agricultural products are transported in interstate commerce, and to that extent they come within the jurisdiction of the federal authorities. Congress, moreover, has power to levy excises on the produce of the land, as on all other commodities, and can use this taxing power to regulate the volume and character of agricultural production. It can discourage one crop by taxing it and encourage another by leaving it exempt. Finally, the national government, by grants of money to the states, or by its own direct expenditures, has been able to do a great deal for the benefit of American agriculture in all its branches.[1]

The general problems to be solved.

American agriculture has had three general problems to solve and in each of these it has had the assistance of the national government. The first is the problem of improving the technique of agricultural production so that more can be raised from a given amount of land and labor. The scientific research work of the public authorities, the improvements in machinery, and the better-

[1] See *above*, pp. 232–233. and pp. 403–406.

ing of methods have combined to increase agricultural production to a point where it exceeds the normal demand. The second problem of the agriculturist is to obtain capital or credit with which to finance his operations during the interval between seed-time and harvest, or during the period when his livestock is growing to maturity. By an elaborate system of agricultural credit the federal government has done its share for him in this regard.[1] Finally, there is the problem of finding a market for the products of agriculture at remunerative prices. Until recent years the federal government did not concern itself to any large extent with this question except to assist the agriculturist by providing information, setting up standards of quality, regulating the exchanges in which agricultural products are sold, and endeavoring to prevent speculation in these products to the detriment of the farmer.[2]

The agricultural adjustment act.

During the World War the agricultural interests of the United States were extremely prosperous, but during the years which followed the close of this conflict the price level of agricultural products underwent a marked decline due to the slackening of the European demand. Agriculture in many parts of the country became unprofitable because labor costs and the prices of industrial products did not fall to a similar extent. In 1929, therefore, Congress passed an agricultural marketing act which aimed to promote and finance coöperative marketing as well as to stabilize agricultural prices. As this measure did not succeed in fully achieving its purpose it was followed in 1933 by a more comprehensive and far-reaching measure, known as the agricultural adjustment act. The primary aim of this measure was to raise the prices which the agriculturist would receive for his products. To this end the secretary of agriculture was empowered to secure a reduction in the amount of agricultural products raised each year, thus eliminating the surpluses which had operated to hold prices down. This reduction was to be secured, in the main, by making voluntary agreements with farmers, plantation owners, and raisers of livestock whereby they would curtail production in return for cash payments from the national treasury. The money for these payments was to be obtained from processing

[1] See *above*, pp. 403–406.

[2] In 1922, for example, Congress passed an act regulating the sale of grain for future delivery.

taxes as already explained. So far as raising the prices of agricultural products is concerned, the measure fulfilled its purpose, in part at least, but in 1936 it was declared unconstitutional by the Supreme Court as an infringement upon the power of the states to control the methods of agriculture.[1] Thereupon Congress undertook to achieve the same end by other methods which it is hoped will prove to be within the taxing and appropriating powers of the national authorities.

The National Government and Labor

Early federal measures for the protection of labor.

Labor relations, throughout the greater portion of American history, have been left to regulation by the several states. From time to time, however, Congress has enacted measures for the protection of labor engaged in foreign or interstate commerce. Notable among such measures were the employer's liability act of 1908 which provided workmen's compensation for all such employees and the Adamson law of 1916 which established the eight-hour day for workers on interstate railroads.[2] Mention should also be made of the Clayton act which in 1914 exempted labor organizations from the anti-trust laws and of further legislation in 1932 which forbade federal courts to issue injunctions against workers for striking or for using the funds of labor unions to maintain strikes. The department of labor at Washington, moreover, has rendered service by its compilation of labor statistics and its endeavors to settle industrial disputes by conciliation.

The NRA provisions.

With the inauguration of President Franklin Roosevelt in 1933, however, a new era in the history of the national government's relation to labor was begun. The national industrial recovery act, for example, contained the following provision:

> "Every code of fair competition . . . shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employees of labor, or their agents, in the designation of such representatives or in self-organization or in other connected activities for the purpose of collective bargaining or other mutual aid or protection: (2) that no employee and no one seeking employment shall be required

[1] *Above*, p. 254.

[2] Note also the abortive attempts made by Congress to abolish child labor by statute. *Above*, pp. 412–413.

as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing, and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President." [1]

While this provision might seem to be clear in its intent it left unanswered the important practical question as to how the "representatives of their own choosing" should be selected by the employees. In most industries there is a division of allegiance and opinion among the employees.[2] Some may belong to a regular labor union, some may be members of a company union (that is, a local organization restricted to the service of a single employer), and some may be affiliated with no labor organization at all. Should the majority rule in the selection of representatives for collective bargaining, or should each group do its own choosing? Much controversy was being centered upon the answer to that question when the Supreme Court declared the national industrial recovery act to be unconstitutional on other grounds.

The Wagner-Connery labor relations act.

In order to secure the retention of these labor provisions in constitutional form Congress then passed the Wagner-Connery labor relations act (1935) which reaffirmed the principle of collective bargaining and forbade interference with workers by employers but restricted its provisions to those industries which are engaged in foreign or interstate commerce. The requirements of this law are enforceable by the national labor relations board of three members appointed by the President.[3]

Lest a misleading impression has been given in the foregoing pages let it be repeated, however, that federal jurisdiction in many of these matters is not exclusive but is merely a supplement to the powers of the states. The states retain a comprehensive right to regulate industry, agriculture, and labor relations within their own borders. The Supreme Court has consistently upheld the doctrine that reasonable state laws for the protection of the public safety, health, and morals, are valid even though they may operate to interfere with foreign or interstate commerce. Thus a state may establish a quarantine at its own borders, or prohibit the operation of freight trains on Sundays, or regulate

[1] National industrial recovery act of 1933, section 7a. See also W. H. Spencer, *Collective Bargaining under Section 7a of the National Industrial Recovery Act* (Chicago, 1935).

[2] On the general question see J. E. Johnsen compiler, *Collective Bargaining* (New York, 1935).

[3] See *above*, p. 234.

the maximum speed of trains, or require that grade crossings be guarded, or establish codes of fair competition in local industries, or limit the hours of labor for women, children, and even for men engaged in certain hazardous occupations, or prescribe minimum wages. Most of the regulations which affect industry, agriculture, and labor relations throughout the United States have been made by the state legislatures or by state boards acting under the authority of these legislatures. The regulatory work of the federal government has been vastly increased during the past generation but the states have not become factors of secondary importance in this field.

Conclusion. Glancing back over the varied matters which have been touched upon in this chapter one can see, nevertheless, how far-reaching the economic influence of Congress has become. The federal government determines what shall come into the United States, who shall come in, what the people shall pay for transportation and communication, how big business may be organized, and under what restrictions it shall be carried on. It has undertaken to tell the planter how much cotton he shall grow and the farmer how many hogs he may raise. It has essayed to determine how many hours men shall work at their own trades, what minimum of wages they shall receive, and in some cases what prices may be charged for the products. Not only that, but the federal government has made itself the regulator of labor relations over a wide field, with a claim to dictate the procedure by which wages and conditions of labor shall be fixed. Little did the framers of the constitution expect, a hundred and fifty years ago, that the federal government which they were setting up would some day attempt to assume authority over all these things.

The steady expansion of federal powers. The reason for this extension of federal powers is to be found in the nature of the situations which have been created by the development of modern business organization and methods. The allocation of powers in the federal constitution rests upon the assumption that all problems are either state problems or national problems. Consequently there are only two alternatives: the exercise of state or of federal jurisdiction over them. In many cases neither alternative is altogether satisfactory but federal control seems to be the lesser of two evils. No matter what the constitution may provide, it is obvious that forty-eight assorted commonwealths cannot be permitted to go their own way in the uncoördinated

handling of economic and social problems which have become nation-wide in character and implications. Some means of unifying public policy with respect to such problems must be found, and in the absence of any other alternative a steady enlargement of federal jurisdiction seems inevitable, even though it may ultimately involve a dangerous concentration of power.

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CHAPTER XXV

THE NATIONAL DEFENSE

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The power requisite for attaining it must be effectually confided to the federal councils.—*James Madison.*

A live subject at the Great Convention.

Anyone who glances through the records of the convention which framed the federal constitution will be amazed at the amount of discussion that was there devoted to the subject of war, including declarations of war, appropriations for the army and navy, the control of the state militia, and the machinery for bringing wars to a close. In the end no fewer than nine specific grants of war power were given to Congress, namely, the power to declare war, to grant letters of marque and reprisal, to raise and support armies, to make rules concerning captures on land and water, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for calling forth the militia to execute the laws of the nation, to provide for organizing, arming, and disciplining the militia, and to exercise exclusive legislation over places acquired for forts, magazines, arsenals, dockyards, and other needful buildings.

Among the eighteen clauses of the constitution which enumerate the powers of Congress, therefore, a very substantial proportion deal with the various branches of military and naval authority. This indicates, as James Madison declared, that security against foreign danger was regarded in 1787 as an "avowed and essential object" of the Union. And well it might be, for the experience of the states during the Revolutionary War had shown the dangers which resulted from the inability of the country to mobilize its full military strength. On more than one occasion the cause of independence seemed likely to be lost through the lack of a strong central authority. The makers of the constitution were determined that, whatever else might happen, the new national government would find itself plentifully endowed with power to defend the country against outside foes and suppress disorder within. So they gave Congress a number of far-reaching war powers.

1. The power to declare war.

According to the constitution Congress alone can declare war. But a formal declaration is not essential to the outbreak of hostilities. Such declarations are customary, but no rule of international law requires them. Declarations of war are not issued for the benefit of the adversary but for the information of neutrals so that they may observe the rules of neutrality and keep out of the way. Not infrequently a declaration of war is issued after the hostilities have actually begun, as, for example, in the Spanish-American War of 1898. When Congress does act, however, a declaration of war is usually embodied in a joint resolution which is then passed in both Houses and signed by the President. This resolution recites the reasons for the resort to arms and ends by declaring that a state of war exists.

The President's relation to such action.

Congress has never yet declared war except on the recommendation of the President, but it undoubtedly has power to take such action on its own initiative and even to pass a declaration of war over the President's veto. On the other hand it should be pointed out that while a declaration of war requires action by Congress, the President can issue an ultimatum to any foreign government on his own authority and the refusal of demands contained in the ultimatum would probably result in hostilities without a declaration. Moreover, as commander-in-chief of the army and navy the President can move these forces in such a way as to make war inevitable. He could order the navy to seize the ships of another country, or to bombard its ports. He could send the army on an errand of invasion. Thus, while the power to declare war is vested in Congress, the power to commit acts of war without a declaration rests with the President.

2. The power to grant letters of marque and reprisal.

Letters of marque and reprisal are now things of the past. A century ago it was the custom of governments to grant such letters to private ships, authorizing them to prey upon enemy commerce. Such vessels were known as privateers and they played a lively part in the Civil War. This was especially true of various Southern privateers which wrought havoc upon Northern shipping. By the Declaration of Paris (1856) the various European countries agreed to abolish privateering, and although the United States government has never formally adhered to this declaration it has now accepted it in practice. No letters of marque were granted during the Spanish-American War or the World War.

The power "to raise and support armies" is vested in Congress

without any limitation except that no appropriation of money for this purpose shall be made for a longer term than two years. That is, Congress cannot commit the nation to a long-term program of military expenditures. In all other respects, whether as to the size of the army, the method of recruiting it, or the measures necessary for supporting it, each Congress has full power. This latitude was wisely given because no one could foresee the dangers with which the Union might some day be confronted, although it was assumed that no standing army of any considerable size would ordinarily be required.

3. The power "to raise and support armies."

The military forces of the United States include, first of all, the regular army. Its size has varied considerably from time to time but it now numbers about 150,000 men of all ranks. Second, there is the national guard or organized militia of the several states,—a somewhat larger body. Although normally under state control, the units of the national guard may be called into the federal service when an emergency arises. In addition there is the officers' reserve corps, the organized reserves, and the enlisted reserve corps. All the foregoing are recruited by voluntary enlistment. If these do not suffice it is possible for Congress to raise additional forces by providing for compulsory military service as was done during the World War.

What the military forces include.

Something should be said in explanation of the way in which this compulsory service is put into operation. Immediately following America's entry into the World War a selective service law was passed by Congress. This law, with its amendments, provided for the selective conscription of male citizens between the ages of eighteen and forty-five. A general registration of all such persons was ordered and in due course registrants were classified into various groups, the first class including all physically fit persons, without dependents, not engaged in any essential industry. Selections were then made from this group after due apportionment of the required number had been made among the states. Those enrolled in the second group were not to be drawn upon until the first group was exhausted. The work of drafting the men was performed under the supervision of the provost marshal general, an official of the war department, assisted by civilian draft boards in all parts of the country. As a result of these various measures the armed forces of the United States rose to nearly four million men before the war came to a close.

The World War draft.

The commander-in-chief and the general staff.

The President is titular commander-in-chief of the army, but in virtually all administrative matters the secretary of war acts on his behalf. A general staff, headed by a chief of staff, advises the secretary of war in all technical matters. The general staff is composed of a variable number of army officers representing all branches of the service, who are assigned to it for stated periods of time. It has five general divisions, namely, personnel, military intelligence, war plans, operations and training, and supply. Each of these divisions has an assistant chief of staff at its head. The general staff is vested with the responsibility for keeping the military forces in a state of preparedness.

Scope of the power "to support armies."

The power "to raise and support armies" gives to Congress in war time an almost unlimited authority over every branch of the nation's economic life. When an army is in training or in the field every branch of commerce or industry, even the home life and habits of the people, may be placed under any necessary restraint to facilitate its "support." It was by virtue of this authority to raise and support armies that Congress, in 1917, empowered the President to establish food and fuel administrations as a means of controlling the consumption of these essential commodities. The taking-over of the railroads, the telegraph and the telephone lines likewise came within the scope of this power to support armies. The espionage and sedition acts, with their rigid restrictions upon freedom of the press and freedom of speech, were also held to be within the war powers of Congress.[1]

Vast scope of the war power.

War submerges all else. So long as the nation is at war there appears to be very little, if anything, in the way of construction, conservation, or regulation that Congress cannot control. The last ounce of national energy may be necessary to support the armies; if so, Congress may call for it. Business may be controlled, taxes multiplied, wealth may be drafted as well as men, and freedom of speech restrained. This is as it ought to be. Modern wars are not fought by armies but by nations. A nation which does not understand that this is the case, and does not realize the civilian sacrifices involved, should never allow itself to be drawn into war.

War and war profits.

During the World War large profits were made by American concerns engaged in various forms of industry, despite the imposition of an excess profits tax.[2] Wages likewise rose to a high

[1] See *below*, p. 463.

[2] On the organization and work of the various war boards which were created

point. Men who were called into the army under the provisions of the selective service law received in most cases only thirty dollars per month (the regular army pay) while those who remained at home were able to earn several times as much. All this was regarded as an injustice and has given rise to two strong movements, one for taking the profits out of any future war and the other for "adjusted compensation" to the men who served in the last one. As respects the question of war profits, Congress in 1930 authorized the creation of a special board to study and report upon a plan which would serve to equalize the burdens of war and this body has now submitted its recommendations. Owing to the pressure of other legislation, however, they have not yet been acted upon.

The bonus problem.

The question of "adjusted compensation" for those who served in the World War has proved to be a more controversial one. One of the lessons of history is that the expenses of a war never cease with the close of hostilities. Civil War pensions are still being paid, seventy years after Lee's surrender. Naturally the government was anxious that a similar burden, on a much larger scale, should not be imposed upon future generations of American taxpayers as a result of the world conflict. To this end a plan of war risk insurance at low rates was worked out and put into operation. It was expected that dependents of war casualties would be supported by annuities under this insurance system. But very soon after the war came to a close it was discovered that war risk insurance had not availed to solve the problem, even in a slight degree. Large sums had to be appropriated by Congress for the vocational training of disabled veterans. Hospitalization facilities were found necessary for sick and incapacitated ex-service men. In addition even larger amounts were granted by Congress in monthly allowances or pensions to those who could show partial or total disability as a result of their war service and even in some cases to those whose disabilities had been incurred subsequent to the close of the war.

Then, in 1924, Congress passed over the veto of President Coolidge, a measure providing that ex-service men (irrespective of disability) should receive certificates of adjusted compensation entitling them to cash payments in 1945, the amount in each case

during 1917–1918, see W. F. Willoughby, *Government Organization in War Time and After* (New York, 1919).

depending on length of service. In 1931 Congress made a further concession by providing that holders of these certificates be permitted to borrow up to half their face value but this did not satisfy the veterans' organizations, for they presently returned with a demand that the certificates be redeemed at once and in full—many years before the date originally agreed upon. To this further demand Congress acceded in 1935 but President Franklin Roosevelt vetoed its action and an attempt to override this veto failed by a few votes in the Senate. In the following year, however, Congress successfully enacted the measure over the President's veto, this time with the provision that the certificates be paid in bonds which could be converted into cash.

4. Prizes and captures in war.

During a war the merchant ships of an enemy country are subject to capture. Such vessels are then brought into one of the captor's ports and a "prize court" determines what shall be done with them. Neutral vessels which assist the enemy by carrying contraband of war, such as arms or munitions, are also liable to capture. The United States has traditionally urged "the freedom of the seas," that is, the right of neutral ships to trade with belligerents without risk of capture and condemnation, but this right is not yet recognized by international law. Accordingly, Congress has at various times considered the advisability of prohibiting the export of arms and munitions to belligerents as a means of safeguarding the United States against unwilling involvement in a future European war.

5. The power "to provide and maintain a navy."

Power "to provide and maintain a navy" is also given to Congress, in this case without any restriction as to the period for which appropriations may be made. The navy consists of battleships, cruisers, destroyers, submarines, airplane carriers, and auxiliary vessels such as supply and repair ships, together with navy yards, navy hospitals, and naval airports. Its personnel consists of more than 100,000 officers and men including the marine corps and the naval air forces. The naval authority includes the right of Congress to make rules for the general administration of the navy in all its branches, including the organization of the navy department and its various technical bureaus.[1] Congress also authorizes the voting of money for the construction of vessels, the determination of the ships to be built, the provision of navy yards and repair depots, and the general direction of the nation's

[1] See also *above*, p. 229.

naval policy. In 1921 the chief naval powers of the world agreed to a limitation of naval armaments during a fifteen-year period. This agreement expired in 1936 and has not been renewed.

6. The power to make rules for the land and sea forces.

Likewise Congress is vested with power to "make rules for the government and regulation of the land and naval forces." The general rules for the government of the land forces are contained in the Articles of War, while the navy is also governed by a general code of regulations. These two codes of rules, enacted by Congress for the government of the land and naval forces, make up a branch of jurisprudence which is commonly known as military law and is administered by courts-martial.

Military law: what it implies.

Distinguished from martial law.

Military law should be clearly distinguished from martial law, for it applies only to persons who are in the military or naval service. Martial law is a term used to designate the government of any region or district in which the ordinary civil administration is superseded by the military authorities. When martial law is proclaimed, the ordinary laws and courts are no longer paramount; the military authorities prescribe the rules and administer them for the time being. Martial law applies to the inhabitants of the area in which it is proclaimed. It may, but does not necessarily, include within its scope the members of the armed forces.

What martial law means.

Martial law may be proclaimed at any time by Congress, or by the President if such action is urgently required before action by Congress can be had. But martial law is never put into force except in case of invasion, grave internal disorder, civil or foreign war, and then only in districts where the ordinary law is unable to secure the public safety. There are no prescribed rules of martial law. The orders of the officer commanding the military forces, when duly promulgated, are to be obeyed and their disobedience may be summarily punished by the military authorities. In other words martial law is not a statutory code but is made up of the day-to-day regulations which are rendered necessary by the exigencies of military control. Special military tribunals, which should be distinguished from courts-martial, are established to administer martial law if necessary; but occasionally the existing courts are retained. Martial law was administered on an extensive scale over large sections of territory during the Civil War.

Limitations on martial law.

While the establishment of martial law in any area deprives the inhabitants of their ordinary civil law and civil courts it does not of itself withdraw from them the constitutional rights of

citizens.[1] Military as well as civil officials are bound by the constitution, and the substitution of martial law for ordinary law does not change the relation between the individual and the nation. The privilege of the writ of habeas corpus is not suspended by the mere proclamation of martial law. This suspension must be specifically made and in a strictly legal sense it can only be made by Congress although the suspension was ordered during the Civil War by the President.[2] The privilege of this writ enables anyone held in custody to obtain a speedy hearing before a regular court; its suspension means that a prisoner may be held indefinitely without a hearing. The constitution requires, accordingly, that this privilege be not suspended except when in case of rebellion or invasion the public safety demands it, but it does not expressly designate that Congress or the President shall decide whether this situation exists.

Military government.

When territory is conquered and held by an invading force it is usually given, for the time being, a military government. This, again, should be distinguished from the administration of martial law, for while the establishment of military government involves the superseding of the old sovereignty it does not usually abrogate the existing legal system. The President, as commander-in-chief, has full power to set up this form of government in occupied territory. A military government, for example, was established by the United States in Puerto Rico after its conquest from Spain in 1898, and remained in charge of the island until 1900, when Congress made provision for a civil administration. Meanwhile martial law was not proclaimed, nor was the old Spanish jurisprudence at once abrogated. A military government was also set up by the United States in the zone occupied by the American troops on the Rhine during the year following the armistice of 1918. Here also the local authorities were left in charge of routine civil functions, subject to supervision by the American military command.

Military law, martial law, and military government, accordingly, are three quite different things although they are often confused. The first, which is effective during peace as well as during war, includes within its jurisdiction only members of the land and naval

[1] On this general subject see Charles Fairman, *The Law of Martial Rule* (Chicago, 1930).

[2] Congress, in 1863, passed a statute validating the President's act.

forces. The second replaces the ordinary civil law, either in peace or war, whenever the regular administration proves inadequate to maintain the public safety. It applies to all the inhabitants of the area in which it is proclaimed. The third, military government, is a form of rule temporarily set up in conquered or occupied territory.

7. The power to call forth the militia.

When the military provisions of the federal constitution were being agreed upon, it was taken for granted that a well-regulated militia rather than a standing army would be the backbone of national defense. Accordingly, provision was made for keeping the militia of the states in existence while giving the federal government the right to use it in an emergency. The constitution provides, however, that the state militia or national guard can be called into the service of the United States for three purposes only—to execute the laws of the Union, to suppress insurrection, and to repel invasion. None of these purposes contemplate the use of the militia on foreign soil. But Congress has found a way of circumventing this limitation, and of making the militia available for foreign service by the simple device of "federalizing" it when need arises. In other words Congress has by law empowered the President to draft into the military service of the United States any or all members of the national guard whenever the use of armed forces in excess of the regular army is authorized.[1] Such action does not merely call the national guard units into the service of the United States, as the constitution provides, but transforms the individual members of the state militia into federal troops which can be sent anywhere.

8. The power to control the organization, arming, and disciplining of the militia at all times.

During periods when the state militia is not in the service of the United States there is a division of control. Congress has power to regulate the "organizing, arming, and disciplining" of the militia, but "the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress" are matters which are expressly reserved to the states. The reason for this divided control, which does not make for efficiency, is to be found in the public sentiment of the country when the constitution was framed. The states were then very jealous of their military privileges and would not have tolerated the complete supremacy of the new national government over all the armed forces of the country. On the other hand it was obvious

[1] By the army organization act of June 4, 1920.

that if each state was left entirely to itself in the matter of organizing, arming, and drilling its militia the country would never be able, in time of emergency, to call forth a homogeneous army. Accordingly, the national government was given such authority as would suffice to secure the necessary uniformity in the militia systems of the several states, while the states themselves were allowed to retain the reins of direct control, including the appointment of all militia officers. This latter right was the one upon which the states laid the greatest emphasis.

9. Powers over forts, arsenals, etc.

In various parts of the country the national government has acquired land for the construction of navy yards, forts, arsenals, and other military or naval works. Over such property, the constitution provides, Congress may "exercise exclusive legislation"; in other words, Congress alone may make laws relating to such areas. The military and naval establishments of the United States are not subject to taxation by the states in which they happen to be located, nor may the states apply to them any restrictions inconsistent with a proper fulfillment of the purposes for which such works are constructed. They are to all intents and purposes federal areas, but no property may be acquired by the national government in any state for military or naval purposes without the consent of the state legislature.

Non-military functions of the army.

The war department has always had various non-military functions entrusted to it. For a long time it had charge of Indian affairs. It still has jurisdiction over all navigable waters in the United States and no possible obstructions can be placed in any such waters without its prior consent. At various times it has had the responsibility for constructing public works, notable among which was the Panama Canal. It still has supervision of the Panama Canal Zone and a few responsibilities in connection with the Philippines although these will eventually come to an end with the full attainment of independence. Finally, when the civilian conservation corps was established in 1933, the war department took charge of the enrolling, transporting, housing, and feeding of the young men in the conservation camps.

War and the bill of rights

Inter arma silent leges. It is an ancient maxim that under stress of armed conflict the laws and the rights of the citizens give way. In the United States this maxim does not apply; the constitutional rights of the citizen remain intact and the ordinary laws of the land continue to operate in war time. Nevertheless it is true that

a state of war requires unusual vigilance on the part of the government and this may lead it to lay various restrictions upon individual freedom which would not be imposed in time of peace. During the World War, for example, Congress passed the espionage (1917) and the sedition (1918) acts which provided penalties for making or circulating false statements with intent to injure the United States, or for using "disloyal, profane, scurrilous or abusive language" about the form of government, the constitution, the flag, or the armed forces. In some quarters this legislation was regarded as an unwarranted interference with freedom of speech.[1]

The espionage and sedition acts.

Everybody agrees that people ought to have reasonable liberty to express their own thoughts in their own way; on the other hand it is just as fully agreed that people must not be allowed to go about preaching treason, uttering slanders, and by word of mouth infringing the rights of others. The question, then, is not whether we should grant freedom of speech or deny it; but how much of it we should grant or deny. In a democracy the presumption should be in favor of freedom. It should be curtailed no further than is clearly required by the public safety. But war inflames popular passions and may impel a government, most of all a popular government, to do unwise things. An excited nation, like an excited man, is entitled to some allowance for the stress of circumstances. We ought not to judge the liberties of the citizens by what happens in war time.

There can be no absolute freedom of speech at any time.

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CHAPTER XXVI

THE POSTAL POWER AND OTHER FEDERAL FUNCTIONS

Neither rain, nor snow, nor heat, nor gloom of night can stay these couriers from the swift completion of their appointed rounds.—*Herodotus.*

The secondary federal functions.

Of the great powers granted to Congress by the national constitution the four most important (namely, the power to tax and to spend, to borrow money, to regulate commerce in the widest sense of the term, and to provide for the national defense) have been discussed in the preceding chapters. But there are various other functions which belong to the federal government, secondary functions they may be termed, although some of them are of considerable significance.

The postal service.

Among these secondary powers given to Congress by the constitution one of the most important is the right "to establish post offices and post roads." "No other constitutional grant," as one writer has remarked, "is clothed in words which so poorly express its object or so feebly indicate the particular measures which may be adopted to carry out its design." [1] The reason, perhaps, is that the framers of the constitution merely sought to perpetuate in central hands a power which was already there and which in its actual workings was well understood by everybody. For the postal system of the country is older than the federal government itself. Its origins date back into colonial times. During the Revolution the service continued to function and after peace had been arranged it was somewhat improved by the Congress of the Confederation.[2] This early service, however, was costly, inefficient, and slow. In 1776 it took twelve days and cost forty cents to send a letter from Philadelphia to Boston by mail coach. In 1936 it costs only six cents and takes a few hours by airplane.

Growth and functions.

Control of the postal service was therefore given to the federal government as a matter of course. In addition Congress was

[1] J. N. Pomeroy, *An Introduction to the Constitutional Law of the United States* (10th edition, Boston, 1888), Section 411.

[2] Benjamin Franklin served for a time as postmaster-general and did much to better the service.

authorized to build and maintain post roads so that the carrying of the mails might be facilitated. The new government took over a relatively small enterprise which has now become the largest single business in the world, with an annual turnover exceeding a billion dollars. For the United States postal service does not confine itself to the handling of mail, although that continues to be its principal function. It also conducts a parcels post system, provides a money order service, and operates a savings bank.

"Fraud orders."

Apart from all this the post office department exercises a considerable degree of control over certain lines of business by virtue of its power to refuse the use of the mails to any concern which has been found to use the service fraudulently. Many years ago the Supreme Court sustained the right of postal authorities to exclude from the mails any matter that they deem objectionable. Congress has delegated to the postmaster-general the power to determine what matter shall be so excluded, and this delegated authority is not subject to review by the courts. Decisions of the postmaster-general, in the case of fraud orders, are final and conclusive. The denial of the right to use the mails is not a deprivation of property, for no one can acquire a right in postal facilities that would be paramount to the proper management of the service.[1]

An agency of regulation.

Through the exercise of its postal authority, moreover, the federal government is able to facilitate the enforcement of the national laws. For example, these laws provide that no newspaper or magazine shall be allowed the privilege of second-class mailing matter if it contains any paid political advertising which is not plainly marked as such. Congress could not require newspapers to refrain from publishing unlabelled political advertising, but it can make such newspapers pay higher rates for the use of the mails. Likewise there is a requirement that newspapers and magazines shall publish twice a year the names of their editors and owners. Nothing happens to a newspaper which refuses or neglects to publish this information, except that it loses the right to be "entered as second-class matter." Newspapers and magazines of general circulation cannot afford to lose this privilege.

Parcels post.

Much controversy preceded the establishment of the parcels post system in 1912. On the one hand the rational flow of trade was hampered by the relatively high rates charged by express

[1] For a survey of the postal authority in its legal phases, see Lindsay Rogers, *The Postal Power of Congress* (Baltimore, 1916), especially chap. vii.

companies on small shipments, hence there developed a widespread popular movement for a system whereby packages of moderate size could be shipped by mail. But on the other hand there was vigorous opposition on the part of the country storekeepers who feared that the mail-order houses in the large cities would profit most from a parcels post system. In the end Congress decided to authorize extension of the postal service into this field and thereby gave a greater stimulus to interstate retail trade.

Postal savings.

About the same time (1910) the postal savings system was also established. By this arrangement every important post office became a savings bank. Deposits by any one individual up to a certain total are permitted and these draw interest at the rate of two per cent. The United States guarantees such deposits in full. Since its establishment the system has grown year by year and it had a particularly rapid growth during the months which preceded the banking collapse of February, 1933. When people became nervous about the banks they transferred their savings to the post offices.

The air-mail service.

The beginnings of the American air-mail service go back only to 1918 when a route between Washington and New York was established. In the course of the next dozen years, however, nearly all the larger cities were given the new facilities. At the outset the government owned and operated this service directly, but with its rapid expansion the policy of awarding contracts for carrying the mails was adopted. Various companies were awarded these mail-carrying contracts in the hope that commercial aviation would thereby be encouraged. In 1933, on the allegation that some of the payments were exorbitant, and had been obtained by reprehensible methods, all air-mail contracts were suddenly cancelled. For a short time the air-mail was flown by army planes, but this proved unsatisfactory and new contracts with companies, at lower rates, were subsequently arranged.

How far does the postal power extend?

The power to establish and maintain "post roads" is an authority which has thus far been drawn upon to only a small extent, yet it might well be utilized to amplify the functions of the federal government in an enormous degree. The original intention was merely to vest in Congress the right to build and maintain roadways if that should be necessary to expedite the carrying of mail from one town to another. But mails are not now for the most part carried by wagon or even by motor trucks; they are handled by the railways and to some extent by airplanes. To interpret the

Does the phrase "post roads" include railroads?

term "post roads" as including railways and landing-fields would involve no greater stretching of a constitutional phrase than that which the Supreme Court permitted when it included telegrams and telephone messages within the word "commerce."

The Supreme Court's answer.

In his message vetoing the Cumberland road bill in 1822 President Monroe asserted that Congress had no power under the constitution to embark upon the policy of highway construction by virtue of its postal authority, but that the postal service must use the existing roads provided by the states. That doctrine, however, has long since been repudiated. The power of Congress to construct roads within the limits of the states has been held by the Supreme Court to be implied not only in the "post roads" clause of the constitution but also in the authority to regulate commerce.[1] Congress, if it does not choose to build the roads as a national enterprise, may grant subsidies to the states for roadbuilding and this it has done in recent years. By the federal highway act of 1916 it agreed to join the states in building certain main highways on a fifty-fifty basis.[2]

The regulation of weights and measures.

The framers of the constitution realized that to facilitate the development of industry and trade throughout the various states it would be necessary to have not only a uniform currency but a uniform system of weights and measures. The power to fix the standards for such a system was therefore given to Congress. Contrary to a popular impression, however, the federal government does not concern itself with the enforcement of its own standards or with the inspection of weights and measures throughout the country. Congress by law has established certain standards of length, mass, and capacity, but it has left to the states the entire responsibility for seeing that these standards are accurately and honestly used. The national bureau of standards in Washington is the custodian of the primary national standards but it supplies the various states with replicas of mathematical exactness. These standards relate not merely to pounds, inches, gallons, and the other measures of ordinary business, but to ohms, amperes, watts, kilocycles, and all sorts of technical units as well.[3]

[1] California *v.* Central Pacific R. R. Co., 127 U. S. 1.

[2] For a discussion of this system of federal grants-in-aid towards roadbuilding see Austin F. Macdonald, *Federal Aid* (New York, 1928).

[3] An interesting popular description of what the national bureau of standards is doing may be found in Frederic J. Haskin, *The American Government Today* (New York, 1935), pp. 164–174.

What the inspection covers.

The inspection of weights and measures, on a basis of their conformity to these standards, is chiefly in the hands of the municipal authorities, but their work is usually performed under the supervision of state officials. This work of inspection, moreover, is by no means confined to the weighing apparatus which reposes on the counters of retail stores—as the average citizen seems to imagine. It extends over a wide range including milk jars, gasoline pumps, taxicab meters, electric, gas, and water meters, jars and containers of a hundred varieties, as well as every kind of weighing device from railroad scales to the delicate balances which are used in the prescription departments of drug stores. The old English standards (pound, bushel, yard, gallon, and their derivatives), somewhat modified, are in general use throughout the country, as everyone knows, but it is not so generally known that the metric system was also made legal by Congress more than fifty years ago and may be used by those who prefer to do so. Thus far, however, its use has been confined to laboratories and other technical establishments.

Power to grant patents.

Congress is also given power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," in other words to grant patents and copyrights. A patent is a certificate given to an inventor, securing for him during a designated term of years the exclusive right to make such profits as there may be in his invention of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." The issue of patents is in the jurisdiction of the patent office, a bureau in the department of commerce. The rules relating to them are elaborate and complicated.[1] A patent is valid for seventeen years during which time the holder can invoke action by the courts against infringement. But the issue of a patent does not protect the owner against suits on the ground that his patent infringes some earlier one. Neither does the government assume any obligation to protect the patents which it grants. The

[1] Here are a few general provisions: The applicant for a patent must make a sworn statement that he believes himself to be the original inventor of the article or process which he seeks to patent; he must submit descriptions and drawings, also a model if required; and must pay a fee. Not everything new can be patented; it must be both "new and useful." It must be something "not patented or described in any printed publication in this or any foreign country prior to the invention and not in public use or on sale in the United States for more than two years prior to the application." When applications come in they are referred to examiners in the patent office, and if a patent is issued, another fee is exacted.

holder of a patent must do his own defending in the courts if he encounters an infringement. This sometimes leads to an unequal contest between the inventor and some large corporation which seeks to obtain, without paying for it, the article or process which has been patented.

Trade-marks.

Trade-marks have no necessary relation to inventions or discoveries and do not come within the power to issue patents or copyrights. But trade-marks used in interstate commerce may be registered at the patent office. When intended for use in trade within a single state they can be protected only by state registration.[1] It should be mentioned, moreover, that the granting of a patent or trade-mark does not give anyone the right to manufacture or to sell his wares except under such conditions as the laws of the states may impose. Even patented articles, if dangerous to the safety, health, or morals of the community, may be excluded by the laws of any state. The imposition by the states of a license fee for the sale of any article, moreover, applies as well to patented merchandise as to any other. The right to manufacture or sell is not derived from the granting of a patent or trade-mark and is neither increased nor diminished thereby. Similarly the fact that an article is patented does not give anyone the right to market it under conditions which unreasonably restrain trade and hence are in violation of the anti-trust laws.

Power to issue copyrights.

A copyright secures exclusive rights to publish and sell any book, magazine or newspaper article, manuscript, musical composition, drawing, map, cartoon, photograph, or similar matter having inherent value. The present term of a copyright is twenty-eight years with the opportunity for a further renewal during a similar term. To obtain a copyright in the United States a book must be actually typeset in this country; but this does not apply to books in languages other than English.[2] Copyright includes all rights of translation, public performance, or dramatization, hence it carries the motion picture rights to a book of fiction or other publication. Likewise it protects against the broadcasting of copyrighted music. Those whose copyrights are infringed have a recourse to the federal courts for an injunction or for damages. Many attempts have

[1] W. D. Shoemaker, *Trade-Marks* (2 vols., Washington, 1931) is the standard treatise on this subject.

[2] Application for copyright is made to the librarian of Congress. The fee is only one dollar, but two copies of the copyrighted publication must be given to the library.

been made to secure some form of international copyright so that an author may have protection in all countries, and considerable progress in this direction has been made by means of treaties.

Powers in connection with naturalization and bankruptcy.

Congress has power to establish uniform rules upon two other subjects, naturalization and bankruptcy. The procedure in naturalization has been already explained.[1] As regards bankruptcy, in other words the making of provision for the distribution of a debtor's assets among his creditors after he becomes insolvent, Congress has not assumed jurisdiction to the exclusion of the states; but where any state law conflicts with a provision of the national bankruptcy act of 1898 (amended in 1926), such state law becomes invalid. The present national law is so elaborate, however, that little room is left for state legislation on this subject. It provides for both voluntary and involuntary petitions in bankruptcy. In the former case the insolvent himself files a petition in a federal district court and officials are appointed by the court (sometimes on the recommendation of his creditors) to take over his assets; in the case of involuntary bankruptcy the petition is filed by one or more of the insolvent's creditors. After the assets have been liquidated the insolvent may under certain conditions obtain from the court a discharge from bankruptcy which relieves him of further legal liability with respect to ordinary debts unpaid at the time of filing the petition. For the security of credit it is obviously desirable that the rules relating to bankruptcy should be uniform throughout the country.

Liberalization of the bankruptcy rules.

An economic depression always increases the number of bankruptcies. Business men, farmers, corporations, and even municipalities find themselves unable to meet their obligations on time and have to seek some arrangement with their creditors. Failing this, they are forced into bankruptcy. Corporations, in such cases, are usually placed in receivership, that is, they are operated by a person or persons appointed by the court for that purpose. In the endeavor to mitigate the financial hardships due to this situation Congress passed a series of amendments to the national bankruptcy act during the years 1933–1934. These amendments provided special relief for heavily indebted agriculturists and also to railroads as a means of keeping them out of the hands of receivers. Similar relief was provided, a little later, for municipalities and other local government areas, including taxing districts.

[1] See *above*, pp. 93–98.

These concessions enable them to readjust their outstanding obligations, with the approval of the court, providing a certain proportion of the bondholders or other creditors agree to the readjustment.

Mortgage moratoria.

Likewise the Frazier-Lemke bankruptcy amendment, passed by Congress in 1934, provided that any farmer who petitioned to be adjudged bankrupt might retain his property even though he could not satisfy the claims of his creditors against it. Instead, he would be allowed by the court to pay, during a period of six years, a reasonable rental based upon the appraised value of the property, this rental to go to his creditors after payment of taxes. The Supreme Court, in 1935, declared this arrangement to be unconstitutional as a deprivation of property without due process of law, whereupon Congress enacted a new farm moratorium law which, it was hoped, would surmount the constitutional barriers.

Powers in relation to the high seas.

"To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations" is another power granted to Congress. The high seas are the waters outside the three-mile limit, or, to speak more accurately, beyond the distance of one marine league from shore. International law recognizes that the territorial jurisdiction of any country extends to this distance from its shores, but beyond the three-mile limit the salt waters of the earth are the "high seas" in which all nations have equal rights and over which all are free to travel in time of peace without restriction. By treaty, however, nations may agree on a widening of the three-mile limit for certain purposes, for example, in the case of vessels suspected of smuggling or rum-running. The United States, during the prohibition era, made a treaty with Great Britain, by the terms of which British vessels could be halted and searched if within one-hour's steaming distance of the American coast. Over American vessels on the high seas the federal government has sole jurisdiction.

Piracy and unneutral acts.

Piracy is now, for the most part, a thing of the past. It was the offense of committing depredations at sea without color of authority derived from any government. Regarded as the common enemy of all mankind, a pirate could lawfully be captured by anyone on the high seas and punished in any country. That is still the rule of international law, although pirates rarely show their grim visages except in melodrama. Offenses against the "law of nations" or against the rules of international law are nowadays for the most

part breaches of neutrality. Congress has defined the duties of American citizens when other countries are at war and forbids the commission of unneutral acts on American territory, as, for example, organizing armed expeditions or fitting out armed vessels in aid of a belligerent power. Such "offenses against the law of nations" are punished by the federal courts. The rules of international law are not always exact and definite, although most of them are sufficiently so to permit their being properly applied. But international law, unlike the law of a single country, has no single tribunal with authority to enforce it.[1] The federal courts of the United States apply the rules of international law only where the controversy comes within American jurisdiction.

Exclusive jurisdiction over the national capital.

The question of a national capital gave the makers of the constitution some trouble. The prize was coveted by various cities, both North and South, and the members of the constitutional convention did not dare make a decision. To avoid an embarrassing difficulty, therefore, the whole matter of selecting a capital was left to be decided by Congress after the constitution should go into operation. It was felt that an entirely new city should be founded to serve as the seat of national government, and with that idea in mind provision was made for creating a small district completely under national control. Congress in establishing the District of Columbia, availed itself of this power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The jurisdiction of Congress over this area is complete. The District of Columbia has no system of local self-government, and Washington is the only large municipality in the country of which that can be said.

Are the powers of Congress adequate?

Reviewing the various constitutional powers of Congress which have been outlined in the foregoing chapters of this book one may ask the question: Are these powers adequate for what the country expects the federal government to do? In a strict sense they are not, but as a matter of governmental actuality they are rapidly becoming sufficient. Step by step, one after another, new powers have been assumed by the federal authorities and their action

[1] There is a World Court, or Permanent Court of International Justice, established under the auspices of the League of Nations; but the United States is not a party to the protocol of this court.

has usually (although not always) been upheld by the courts. As a result of this expansion the people of the United States have been brought far more intimately into contact with the federal government than the framers of the constitution could ever have imagined. This is particularly true of economic activities. The small endowment of economic authority which the statesmen of 1787 gave to Congress has enabled it, with the lapse of time, to exercise a vast amount of control over the interests of agriculture, trade, communication, banking, credit, and business organization throughout the length and breadth of the land.

The army of national officers.

In early days the work of the national government was chiefly centered at Washington. Apart from postmasters and collectors of customs there were very few federal officers located anywhere else. Today one finds them in large battalions all over the country. There are forest rangers, agricultural agents, bank examiners, railway mail clerks, immigration inspectors, collectors of internal revenue, income tax examiners, appraisers, public works engineers, relief officials, and officials of endless other varieties, whose total number runs into the hundreds of thousands. They are the incarnation of a government whose functions are growing like dandelions in the springtime. Nor is there any likelihood that this expansive process is nearing its end. On the contrary the national government has discovered, and is now utilizing, a powerful new agency for widening the scope of its activities.

A new device for promoting congressional power: grants-in-aid.

This is the system of federal grants-in-aid to the states. It is not really a new device because Congress has used it in sporadic instances for nearly a hundred years. But since the turn of the twentieth century the practice of making grants-in-aid has been considerably extended. In brief it is a scheme by which the national government offers to match the states, dollar for dollar, or on some such basis, in promoting enterprises which are properly within state jurisdiction but need to be speeded up. Thus the Weeks act of 1911 undertook to expedite the work of forest-fire prevention by this method of federal subsidizing. Three years later the Smith-Lever act made a fifty-fifty provision for instruction and demonstrations in agriculture and home economics. The federal highway act of 1916 extended the plan to rural roadbuilding, and a year later the Smith-Hughes act appropriated federal funds for the promotion of vocational education on the same terms. Other measures of similar type have followed in rapid succession,

especially during the years of economic emergency. Vast sums have been given or loaned to the states and municipalities since 1932 as a means of promoting public works for the relief of unemployment. And, finally, the whole scheme of unemployment insurance and old age annuities which was established by Congress in 1935 rests on the principle of giving federal aid to the states for social welfare purposes.

Merits of this practice.

The argument for federal grants-in-aid is that the nation should be regarded as a unit, not merely as a group of states. There is a national interest in some matters which are legally within state jurisdiction—such as roads, education, public health, the relief of distress, unemployment insurance, and old age pensions. The federal government should therefore assume a constructive leadership in such matters and induce all the states to do their full duty. And this, of course, can best be accomplished by giving them financial assistance. Likewise it is recognized that there are various things which the states must be persuaded to do in unison if they are to be done at all. If only a few states established compulsory unemployment insurance, for example, they would be penalizing themselves through a higher cost of producing goods in competition with the remaining states. Where Congress, therefore, does not have the power to compel united action on the part of the states it is attempting the policy of persuasion by means of federal subsidies.[1]

A final query on congressional powers.

A final question suggests itself: Are there some fields of jurisdiction which ought to be transferred to the federal government by constitutional amendment so that the general welfare will no longer have to be pursued in roundabout ways, through subsidies and otherwise? Doubtless there are. There are many who believe that Congress ought to have jurisdiction over all commerce, whether within the individual states or among them. The distinction between interstate and intrastate commerce is no longer a practicable one. Along with this power over all commerce would go complete and undisputed control over banks and other agencies of credit, with state banks fading out of the picture. Congress, it has been suggested, should likewise have the power to make uniform rules concerning the chartering of business corporations. Unquestionably it should have the right to make uniform rules as to the granting of divorces in the United States, thus placing

[1] See also *above*, p. 468.

a curb upon what has become, in some states, a social scandal. It should have power to impose duties on exports. There are educators who believe that Congress should have the right to prescribe a minimum of public education throughout the United States. Other reformers have proposed to federalize the care of the public health, the making of labor laws, and the protection of all national resources. If we were making a general revision of the federal constitution today it is altogether probable that some of these additional powers would be given to the national government.

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CHAPTER XXVII

CONSTITUTIONAL LIMITATIONS

The idea that man has rights behind and beyond the written laws is peculiar to us. The doctrine that there are certain cardinal, or natural rights of man which no government ought to, and ours cannot, take away is peculiar to us of the United States.—*Thomas M. Cooley.*

Constitutional limitations: their nature and scope.

In the foregoing chapters the various powers of Congress have been outlined. But the constitution does more than grant powers. It imposes limitations. It sets limits upon the exercise of legislative authority. The makers of this constitution did not believe in placing unlimited power anywhere; they were afraid of absolute authority, no matter wheresoever lodged. Accordingly they encircled Congress with a considerable number of limitations and prohibitions. Some of these relate to the way in which a power may be exercised, as, for example, the provision that all federal taxes shall be uniform throughout the United States. Others are in the nature of general prohibitions; that is, they forbid the exercise of certain powers under any circumstances. Thus no export duties may be levied by Congress, no matter what the occasion or need may be. In some cases a power is prohibited to the states but permitted to Congress,—the right to issue and coin money is an illustration. In other instances it is forbidden to both. Examples may be found in the provisions which outlaw bills of attainder and forbid the creation of a nobility. Some of these limitations are scattered through the original constitution while others have been inserted in the amendments, particularly in the first ten amendments.

Specific limitations:

Let us look, first of all, at the specific restrictions which are placed by the constitution upon the national government. Congress is forbidden to pass any bill of attainder. A bill of attainder is a legislative measure which inflicts a penalty without a judicial trial. Legislation of this sort was frequent during the Tudor and Stuart periods of English history. By bills of attainder men in high office were "attainted" of treason and sent to the scaffold without even the forms of judicial process, their descendants being

1. Bills of attainder.

deprived of civil rights. Students of English history will recall the case of Thomas Wentworth, Earl of Strafford, who was beheaded during the reign of Charles I by order of parliament under a bill of attainder. By less drastic measures known as bills of penalties other Englishmen were fined, thrown into prison, or had their property confiscated. The enactment of attainders in any form (including bills of penalties) is prohibited by the American constitution because its makers believed that the courts, not the legislature, ought to have the function of determining guilt or innocence.

2. *Ex post facto* laws.

The constitution also forbids the passing of *ex post facto* laws. This prohibition has been somewhat misunderstood, for it does not by any means apply to all laws which are retroactive in effect. The limitation applies to criminal laws only, and even here it does not affect laws which operate to the advantage of an accused person. In discussing this matter one can tread upon firm ground, for the Supreme Court has given a full and exact definition of *ex post facto* laws. Such laws, in the words of the court, include:

> "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action; every law that aggravates a crime, or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment than the law annexed to a crime when committed; and every law that alters the legal rules of evidence and requires less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." [1]

In a word the term includes only retroactive criminal laws which take away from an accused person some right which he possessed at the time named in the accusation. Laws which decrease the penalty or modify judicial procedure to the advantage of the accused are not forbidden even though they be retroactive in effect. Thus it is allowable to abolish the death penalty and give the benefit of this abolition to persons already convicted of capital crimes.

3. Treason.

Taking a lesson from English political history the makers of the constitution also limited the power of Congress with respect to the definition and the punishment of treason. Treason is the oldest of crimes. In England it goes back to the time of the Saxon kings. Originally it was the offense of killing the monarch, but in due course various other offenses were included, such as levying

Early history of this crime.

[1] Calder *v.* Bull, 3 Dallas, 386.

war against the king. During several centuries the category of treasonable offenses steadily widened, all manner of "new-fangled and artificial treasons" being added to the list from reign to reign until the unrestricted power to make and alter the law of treason became a weapon of abuse and oppression.

Treason against the United States.

To make sure that there should be no such extension in the United States the constitution restricts the crime of treason to a certain definite offense, namely, that of levying war against the United States, adhering to their enemies, or giving them aid and comfort. There must be open activity, not mere words or intent, for the constitution further provides that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Aaron Burr was acquitted of treason in 1807 because he had committed no overt act although it was proved that he had been engaged in a treasonable conspiracy. The penalty for treason, moreover, must in no case extend beyond the life of the person convicted. Punishment may not be imposed upon the descendants of a traitor, or, as the words of the constitution express it, the penalties shall not "work corruption of blood or forfeiture, except during the life of the person attainted."

Treason against a state.

The foregoing applies only to the crime of "treason against the United States." But treason may also be committed against one of the states, and each state has the right to make its own definition of it. John Brown was executed in 1860 for treason against the State of Virginia. Each state may also make its own rules of evidence in treason cases and may prescribe such penalties as it sees fit. But in such matters it must keep within the other provisions of the federal constitution which require that all accused persons shall be given due process of law and the equal protection of the laws.

Treason and sedition distinguished.

Treason should be distinguished from sedition. The latter is whatever the laws define it to be, for the constitution incorporates no definition. Hence Congress has been able to penalize as sedition various offenses which would be treason save for the absence of overt acts. Thus the sedition act of 1918 provided severe penalties for anyone who used any words intended to bring the military or naval forces of the United States into disrepute. This statute in effect created a number of "new-fangled and artificial treasons" under a new name. In other words the constitutional provisions

limiting the crime of treason do not prevent Congress from defining other offenses as sedition and prescribing penalties just as heavy as those imposed for treason.

4. Due process of law.

Then there is the constitutional requirement as to due process of law. In the Great Charter which the barons of England wrung from King John in 1215 there was a stipulation that no free man should be in any manner penalized save by "the lawful judgment of his peers or by the law of the land."

> "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut autlagetur, aut exultur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae." [1]

This fundamental right of freemen was repeatedly emphasized in the landmarks of English civil liberty such as the Petition of Right (1628) and in this evolution the phrase *per legem terrae*, or law of the land, came to be used interchangeably with the expression "due process of law." [2] In this form it passed into the Constitution of the United States as a part of the fifth amendment (1791) which provides that "no person shall be deprived of life, liberty or property without due process of law." The words "life, liberty and property," of course, hark back to colonial days and to the Declaration of Independence with its assertion of the citizen's right to life, liberty, and the pursuit of happiness.

The meaning of "due process."

The meaning and scope of these four words "due process of law," however, have given the courts and the commentators a great deal of trouble, and even today their exact application is not absolutely clear. Few legal phrases in the whole history of jurisprudence have proved so elusive. Due process has become a sort of palladium covering all manner of individual rights. The highest American tribunal has refrained from committing itself to any hard and fast definition of the term, preferring rather that "its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise." [3]

[1] No free man shall be arrested, or imprisoned, or evicted from his land, or outlawed, or exiled, or in any other way harassed, nor will we impose upon him, or send him our commands, save by the lawful judgment of his peers or by the law of the land. *Magna Carta*, Article 39.

[2] The phrase "due process of law" first appeared in a statute passed by parliament in the fourteenth century (28 Edw. III, 3). We have the word of the great English jurist, Sir Edward Coke, in his *Institutes*, that it was there used as the equivalent of the older phrase "law of the land."

[3] Twining *v.* New Jersey, 211 U. S. 78.

Daniel Webster's definition.

But all students of American government know in a general way what the phrase means. It means that there must be, in all actions to deprive a man of his life, liberty, or property, an observance of those judicial forms and usages which by general consent have become associated with fair dealing. Daniel Webster, in a famous argument before the Supreme Court, gave a definition of due process which will probably serve the layman as well as any other. It is the process of law, he asserted, "which hears before it condemns, which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." [1]

The application of due process to judicial procedure.

Thus the requirement of due process clearly renders invalid such things as acts of confiscation without judicial trial, laws which arbitrarily take property from one individual or group and give it to another, laws which retroactively reverse judgments of the regular courts, and in fact all arbitrary exertions of power in the form of legislative enactments or executive decrees. The courts have held that due process of law requires a hearing of the issue before it is decided; but this does not necessitate that the hearing shall be by a jury or even by a judge. What constitutes a fair hearing must be determined by the circumstances. Questions involving a deprivation of property are sometimes determined by administrative officers, as for example in the sale of lands for non-payment of taxes. The right of an alien immigrant to enter the United States is determined by the immigration authorities, not by a judge and jury. The right of a newspaper to have the second-class mailing privilege is decided by the postal authorities, not by the courts. In other words the adjudication of such questions by an administrative board, or even by a single administrative officer, is not deemed to be a denial of due process so long as a right of appeal to the regular courts is preserved or so long as the proceedings are characterized by the essentials of fair play to those whose liberties or property are concerned.[2]

It will be noted that the due process requirement appears twice in the constitution, once as a limitation upon Congress (fifth

[1] The Dartmouth College Case, 4 Wheaton, 518.

[2] Those who wish to pursue this subject further may be referred to Rodney L. Mott, *Due Process of Law* (Indianapolis, 1926), John M. Mathews, *The American Constitutional System* (New York, 1932), pp. 384–426, and L. P. McGehee, *Due Process of Law under the Federal Constitution* (Northport, N. Y., 1906).

Due process in the states.

amendment) and once as a limitation upon the states (fourteenth amendment). The Supreme Court has applied it with an equal hand to both. But the states have been the chief offenders in their attempt to circumvent this limitation. More especially has this been the case with numerous laws which state legislatures have enacted for the ostensible purpose of promoting the public safety or public health, but which in reality have been designed to deprive individuals or corporations of their property in an arbitrary way. For within the term "property" is included not merely what already belongs to its owners but the right to acquire further belongings in any lawful manner, in other words the right to freedom of contract.

Due process in relation to the police power.

In this connection a word should be added with respect to what is known as the "police power" of the nation and the states. It is one of the most important and comprehensive among governmental powers. Speaking broadly, it may be defined as the right of a government to regulate the conduct of its people in the interest of the public safety, health, morals, and convenience. Under this comprehensive authority a government may make regulations concerning the safety of buildings, the abatement of nuisances, the regulation of traffic, the reporting of communicable diseases, the inspection of markets, the sanitation of factories, the hours of work for women and children, the sale of intoxicants, and countless other matters. Such regulations inevitably involve a deprivation of someone's liberty or property; but this does not render the regulations unconstitutional provided they represent a reasonable exercise of the police power and are designed to accomplish a legitimate public purpose.[1]

How far does the police power extend?

There is a twilight zone, however, in which the scope of the police power is not yet clear. May the laws deprive a citizen of his property in order to promote the aesthetic welfare of the community—for example, by providing that no one may build a house on his own land until the type of architecture has been approved by a municipal art commission or some other body? Such a condition may be imposed by subdividers or sellers of land, at the time of sale, but not by the public authorities. Is it allowable to provide by law that residential property in designated sections of a city shall not be sold or rented to colored people? Can such a measure be justified as a reasonable regulation in the interest of the public

[1] C. B. & Q. R. R. *v.* Illinois, 200 U. S. 561 (1906).

safety, health, morals or convenience? The Supreme Court has held that it cannot.[1] May the government forbid an owner to take more than a specified amount of oil or water out of his own wells? The court has held that it can.[2] In brief, each issue must stand on its own feet. In times of war or other emergency a regulation may be reasonable when under normal conditions it would constitute an arbitrary deprivation.

Due process is not stationary.

Due process of law is not a stereotyped thing. A true philosophy of liberty must permit adaptation to new circumstances. It follows, therefore, that any legal proceeding which is in furtherance of the public good, and which preserves the principles of liberty and justice, must be held to be due process of law. To declare once and for all that certain rigid rules must in every case be observed would be to mummify all legal progress. The requirement as to due process was framed to afford protection against gross legislative unfairness; it was not intended to become a barrier to the reasonable regulation of individual liberty or of private property in the interests of social and industrial justice.

5. The right of eminent domain.

Another constitutional restriction provides that "private property shall not be taken for public use without just compensation." To understand the nature of this limitation one must know something about the right of eminent domain. This right of a government to take private property for public use arises from the necessity of acquiring land for forts, navy yards, post offices, customhouses, national parks, prisons, lighthouses, highways, and so on. Hence the *domain*, or "property-taking right," of the nation and the state is *eminent* or paramount, in other words it is superior to the property-holding right of any individual.

Limitations upon the right of eminent domain:

But the constitution imposes a threefold limitation upon the right of eminent domain. First, the taking of private property must be for a *public* purpose. Property cannot be taken by the government from its private owners and then turned over for use by some other private individual or corporation. Second, just compensation must be paid to the owner. Third, the owner of property must be given due notice and the privilege of a hearing before his property is taken away from him.

All private property, of whatever sort, including not only land and buildings, but right of ways, ships, supplies, even electric cur-

[1] Buchanan *v.* Warley, 245 U. S. 60 (1917).
[2] Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900).

(a) As to public purpose.

rent and contracts for delivery of goods, is subject to the right of eminent domain provided it is required for a public purpose. But what is a public purpose? The courts have been liberal in their interpretation of this term. They have upheld the taking of land not only for post offices and other buildings but for all other purposes related to the functions of government. Moreover, the government may delegate its right of eminent domain to counties, cities, school districts, or even to railroads or other corporations engaged in public or quasi-public enterprises. The right may be delegated to a company which is mainly operated for private gain, provided it is engaged in a business which is "affected with a public interest." Hence the right to take private property, on payment of just compensation, has been frequently given by state legislatures to light and power companies, irrigation districts, and in some instances to endowed colleges. But it cannot be delegated to strictly private concerns where no color of public necessity appears. The line, of course, is difficult to draw because all forms of private business are affected with a public interest in some degree.

(b) As to just compensation.

When private property is taken for a public or a semi-public purpose the constitutional requirement is that "just compensation" must be paid to the owner. But how is this compensation determined? As a matter of practice, the officers of the government first make their own valuation and offer the owner what they deem to be just. The owner, in most cases, rejects this offer and asks for more. Then, by the usual process of bargaining, an agreement or some compromise figure may be reached. But if the owner cannot get what he believes to be fair compensation in this way he has an appeal to the courts. But it is allowable to have the decision made by an administrative tribunal, with no appeal to the regular courts on questions of fact, provided a fair administrative procedure is followed.

6. Judicial forms and procedure.

Many limitations with respect to methods of judicial procedure are incorporated in the national constitution, especially in the first ten amendments. These limitations relate to jury trial, the rules of evidence, the nature of punishments, and to the placing of anyone in double jeopardy for the same offense. But such restrictions can be more appropriately explained in a later chapter dealing with the judicial power of the United States.[1] Let it be made plain at this

[1] See *below*, Chapter XXIX.

point, however, that the limitations of the national constitution in this respect apply to the procedure of the federal courts only; they do not place any restrictions upon the state courts. The latter are governed, as to ordinary judicial procedure, by the terms of their own state constitutions. No one can claim the privilege of trial by jury in a state court unless the state constitution and state laws have given it to him.

Some implied limitations.

As there are implied powers in the Constitution of the United States, so there are implied limitations, that is, limitations which do not appear in express terms but follow from the general nature, form, and purposes of the federal government. The constitution, for example, does not expressly forbid Congress to delegate any of its lawmaking powers to the President, or to the heads of departments, or to the various administrative boards or even to the people.

Yet it is "one of the settled maxims in constitutional law," according to America's foremost authority on this subject,

> "that the power conferred upon Congress to make laws cannot be delegated by that department to any other body or officer. Where the sovereign power of the state has located that authority, there it must remain, and by that constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative [of lawmaking] has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." [1]

A nation-wide referendum impossible.

Because of this well-recognized limitation a nation-wide referendum as a means of accepting or rejecting a law would not be constitutional. Congress might, if it so chose, submit a question to the people as a means of securing an advisory test of public sentiment, and the Democratic national platform of 1924 proposed that the question of adhering to the League of Nations should be so submitted; but the formal enactment of all federal statutes, as well as the conduct of foreign policy and the undivided responsibility therefor, must remain exactly where the constitution placed it. Congress cannot delegate its legislative power and responsibility

[1] T. M. Cooley, *Treatise on Constitutional Limitations* (7th edition, Boston, 1903), p. 163.

Administrative discretion may be delegated.

even to the whole people. To establish the principle of direct legislation by the people, so far as national lawmaking is concerned, would require an amendment to the constitution.

But while Congress may not delegate its lawmaking power, it may delegate to some other body (or to some official) the function of determining when and how the provisions of the law are to be carried out. This latter is held to be a ministerial, not a legislative function. It is permissible for Congress to provide, for example, that a law shall go into effect whenever the President shall adjudge certain conditions to exist and shall so announce by proclamation.[1] It may make an appropriation for the relief of unemployment and leave to the President the discretion to determine how the money shall be spent. But it must retain the ultimate lawmaking power in its hands. That is one of the reasons why the national industrial recovery act was held unconstitutional by the Supreme Court in the Schechter Case (1935). This statute had delegated to the President full power to accept or reject codes of fair competition submitted to him by persons engaged in particular industries, and when accepted by the chief executive such codes were to have the force of law. The court held this procedure to involve a surrender by Congress of its lawmaking authority.[2]

Importance of this principle.

But while the substance of legislative power may not be delegated, it is allowable to give the executive branch of the government a large amount of leeway in determining the detailed procedure by which the laws shall be put into operation. This principle is of great importance because the conditions with which the laws have to deal are becoming so complex. Laws are not by nature resilient or flexible. Hence the general provisions of a law, when unmodified by the exercise of official discretion, are almost sure to work injustice. The best system of regulation is one which can be varied in strictness as the occasion demands. Such a system obviously requires that room for the exercise of judgment, in the administration of the laws, shall be vested in some executive officer or board. Hence it has become the policy of Congress to give powers of a comprehensive and diverse character to the President, or to various federal boards, such as the interstate commerce commission, the federal reserve board, the federal trade commission, the securities and exchange commission, and even to such administrative

[1] Field *v.* Clark, 143 U. S. 649.
[2] See also *above*, p. 78, *footnote* 2.

officials as the postmaster-general or the commissioner-general of immigration.

It has introduced a new feature into American government.

One result of this policy has been to take the country a long way from its old legal traditions. If continued year after year, and on a broad scale, it will make the government of the United States more and more a government of men. During the past quarter of a century there has been a steady growth of "administrative law," which is a rather incongruous term in a country that professes to maintain a complete separation between legislative and administrative authority. It means that administrators, as well as legislators, are making the laws of the land, for they are issuing orders and regulations which have the force of law. So rapidly has this system of administrative lawmaking been extended that today a large part of the federal government's regulating authority is exercised by the issue of executive orders, administrative decisions, departmental rulings, and rules promulgated by all sorts of government boards. We have a general law relating to the federal income tax, for example, but there are literally thousands of points which this law does not cover. Each one of these, when it arises, is covered by a ruling or order issued from the bureau of internal revenue. These rulings have become so numerous and so complicated that only an expert can thread his way through them.

Namely, administrative law.

Its rapid growth.

Or, take another example,—the orders and rulings of the interstate commerce commission. They have become almost innumerable and cover all sorts of matters relating to rates, service, accounting and financing in connection with the railroads. The social security act which Congress adopted in 1935 is couched in general terms, with relatively few provisions covering matters of detailed administration. It will be incumbent upon the social security board, if the law is held constitutional, to issue countless orders on all sorts of questions as they arise. Thus we are developing in the United States a huge body of administrative law which is enforceable by the courts although its provisions have not been sanctioned by the regular lawmaking bodies at all. They have been framed and issued under a general grant of authority by the representatives who are elected by the people to make the laws.

Its value and limitations.

This does not mean, however, that the development of administrative law is a thing to be deplored. Regulation by administrative order is more equitable and more effective than regulation by broad legislative decree. The latter cannot bend without being broken.

There is nothing dangerous about a government of men so long as it is a *government of men controlled by law*. So long as the administrative authorities are required to keep within the boundaries set for them by legislative enactment the danger of bureaucratic autocracy is small. But if Congress is ever permitted to delegate the substance of its lawmaking power, and give the President or his subordinates a wide-open authority to make rules with the force of law,—if that ever happens there will be an end to the principle on which the American political system has traditionally rested. The decision of the Supreme Court in the Schechter Case is of great significance in that it indicates a determination to prevent, by judicial review, an undue delegation of legislative authority to the executive.

A final word on constitutional limitations.

The foregoing are not the only limitations upon the powers of Congress. Some others, more particularly those which relate to the rights of the citizen, have been discussed in a previous chapter; others, which concern judicial procedure, will be explained in connection with the work of the federal courts. A complete list of constitutional limitations in the United States would probably mount into the hundreds. Congress, as someone has said, is a leviathan in chains. Perhaps we have limited the powers of the national legislature to a greater extent than there is need for, and it is probable that if the people of the United States were reframing their constitution tomorrow, some of these limitations would be left out. They were inserted in an age when legislative tyranny was greatly dreaded, and today that danger has passed by. The present generation, taking heed of European experience, is more afraid of executive tyranny or dictatorship. There is no likelihood nowadays that Congress would pass bills of attainder, or take property without compensation, or establish an American order of nobility—even if the limitations which relate to these things were stricken from the constitution altogether. On the other hand the tendency towards aggrandizement on the part of the executive in all countries is one that students of government should note and reflect upon. Does it mean that the nineteenth-century habit of identifying democracy with the supremacy of legislative bodies is to be discarded and replaced by the concentration of power in a single hand?

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CHAPTER XXVIII

THE TERRITORIES, INSULAR POSSESSIONS, AND NATIONAL CAPITAL

It was Napoleon who, by selling Louisiana to the United States, made it possible for the Union to develop into the gigantic power that we see.—*Sir J. R. Seeley.*

The reluctant obedience of distant provinces generally costs more than it is worth.—*Lord Mahon.*

The United States as a colonizer.

One does not usually think of the United States as a colonizing country, yet the history of the nation is an almost unbroken chronicle of territorial expansion. The area of the original thirteen states was less than one tenth of the territory under the flag of the United States today. No other nation has had such an increase during the past fifteen decades or has filled its new acquisitions so largely with its own people.

The imperial area of today.

Most Americans do not realize what an imperial area they possess. Take a map of the United States and superimpose it upon a same-scale map of Europe. San Francisco will fall where Liverpool is, while Baltimore drops east of Constantinople. New Orleans keeps company with Palermo, while Minneapolis is up near Moscow. The entire kingdom of Italy, with its forty-two million population, is just a little larger than the single state of Colorado. Put England, France, and Germany together and you have a smaller combined area than the two states of Texas and California. Indiana is bigger than Austria, while Belgium would fit comfortably into the niche that Maryland occupies. In a geographical sense the United States is not a nation but a league of nations.

The two periods of expansion: 1. Within the present boundaries.

The history of American national expansion may be divided into two periods. First there is the era extending from the close of the Revolutionary War to the year 1867. It was during this interval that the United States acquired by successive treaties all the land included in the Northwest Territory, as it was then called, together with the Louisiana Purchase, and Florida. Toward the middle of the nineteenth century the nation also secured by

conquest from Mexico, and by the admission of territories which had declared their independence of Mexico, the enormous areas of Texas, the Southwest, and the South Pacific slope. Title to the North Pacific slope, up to the forty-ninth parallel, had been acquired a few years earlier by a treaty with Great Britain. All this territory was contiguous and could eventually be parcelled into states of the Union. Hence the expansions of this period merely represented the rounding-out of national boundaries and presented no problems of an external character.

2. Outside territories and insular possessions.

But the second period, extending from 1867 to the present time, has involved various territorial acquisitions of a different sort. By the purchase of Alaska from Russia in 1867 the United States acquired its first non-contiguous possession other than a few small guano islands. This precedent was not followed, however, by any further ventures into outlying areas until 1898, when the Philippines, Puerto Rico, and Guam were acquired; and in the same year Hawaii was annexed at the request of its own government. In 1899 an agreement with Great Britain and Germany gave to the United States certain islands in the Samoan Archipelago, and in 1904 the Panama Canal Zone came under American control as the result of a treaty made with the new Republic of Panama. Finally, in 1917, the Danish West Indies were acquired by purchase.

Differences between the two forms of expansion.

All these acquisitions differed from those of the preceding period in that they are separated from the main territory of the United States and are not necessarily assured of admission to statehood at any future date. Since 1898, therefore, the United States has faced the fact that its jurisdiction includes two classes of territory; one enjoying the full rights and privileges of statehood, the other made up of outlying possessions some of which must continue to be colonies in the usual sense of the word, no matter by what name they may be officially designated.[1] Phrases do not alter facts. A mother country does not get rid of colonial problems by resorting to a mere twist in terminology. Dependent territories, situated afar-off, and largely peopled by an alien race, present much the same problems to home governments everywhere.

The makers of the constitution foresaw that the Union would eventually comprise more than the thirteen original states. They

[1] It is hardly conceivable, for example, that the Panama Canal Zone, Samoa, and the Virgin Islands will ever be admitted as states of the Union.

The constitutional basis of expansion.

knew, of course, that a large region of hinterland was already being governed by the confederation under the terms of the Northwest Ordinance and that this territory would eventually be carved into states as the ordinance contemplated. Hence they made provision that the territory "belonging to the United States" should be governed as Congress might decide and that new states could be admitted to the Union by Congress at its discretion, subject to certain prescribed limitations. The constitution did not, however, in express terms bestow on Congress the right to acquire new territory, and in connection with the Louisiana Purchase of 1803 it was argued in some quarters that Congress had no such right. The Supreme Court, however, has settled this question by repeatedly deciding that the United States, as a nation, has the same right to acquire territory as any other sovereign nation.[1] The power to make treaties implies the power to gain territories by treaty. The power to declare and wage war implies the right to make conquests. The power to admit new states implies the right to acquire areas out of which new states may be created.

Constitutional questions connected with outlying possessions.

But admitting the right of the United States to acquire territory, many other questions arose to be settled. Is the control of Congress over such territory complete and unrestricted, or is Congress bound there by all the limitations of the national constitution? Have the inhabitants of territories the same constitutional rights as citizens of the states, for example, the right to keep and bear arms and the right to trial by jury? Is a Hawaiian or a Puerto Rican entitled to these rights by the mere fact that the American flag flies over his islands? And what about the operation of such laws as Congress may make? Do they extend to these islands as a matter of course or only when their extension is expressly provided for? Does a tariff law, for example, apply only to merchandise which comes into the United States proper, or to all goods entering the insular possessions as well? All these questions have come before the Supreme Court at one time or another and have been answered by that tribunal, hence the constitutional status of territories and insular possessions is now fairly well settled.

Summarizing the main features in this chain of judicial decisions one may lay down the following general rules: The power of Con-

[1] "By the law of nations, recognized by all civilized states, dominion over new territory may be acquired by discovery and occupation, as well as by cession or conquest." Jones *v.* United States, 137 U. S. 202 (1890).

gress over the outlying territories of the United States is practically complete. The inhabitants of the insular possessions are not citizens of the United States unless and until Congress extends citizenship to them. The provisions of the federal constitution relating to the rights of citizens (for example, the right of trial by jury) do not extend to the inhabitants of all the territories unless and until Congress so provides. In the Insular Cases (1900) the Supreme Court set up a distinction between "incorporated" territory, on the one hand (that is, territory which is treated as an integral part of the United States) and "unincorporated" territory which has not been so recognized by Congress. On this basis Hawaii and Alaska are incorporated territories, while Puerto Rico, the Philippines, Guam, Samoa, the Canal Zone, and the Virgin Islands constitute the unincorporated group.

The rules as enunciated by the Supreme Court.

Incorporated and unincorporated territories.

As respects the incorporated territories (Alaska and Hawaii), all the applicable limitations of the constitution are in full force; but elsewhere Congress is bound only by those "fundamental" provisions of the constitution which automatically extend to all American soil. The Supreme Court did not explain, however, just what provisions are fundamental but left this to be determined in particular cases as they might arise. As respects tariff laws it has held that the provision as to uniformity of taxation is not among the fundamental ones and hence that Congress may provide a special rate of duty on goods coming into the unincorporated territories such as the Philippines and Puerto Rico, or from them into the United States. Likewise it has held that the requirement of a jury trial is not one of the fundamental provisions which automatically extend to the unincorporated territories.

Extension of "fundamental" rights to the incorporated territories.

Owing to the diversity in local conditions among the various possessions of the United States, no attempt has ever been made to establish a uniform scheme of government for all of them. Each is somewhat differently organized from the others. Alaska is a fully organized territory just as Arizona and New Mexico used to be, and all laws passed by Congress apply to Alaska as a matter of course. Its citizens are American citizens. Alaska has a governor appointed by the President of the United States and a territorial legislature. This legislature is made up of two chambers, a senate and a house of representatives, the members of both being elected by the people. It has the usual lawmaking powers, but its acts must not be "inconsistent with the constitu-

Present government of American dependencies: Alaska.

tion and the laws of the United States." There is universal suffrage but with a literacy test. The governor has a veto power similar to that of the President, and laws passed by the Alaskan legislature may also be disallowed by Congress. Alaska is represented in Congress by a delegate who may speak there but has no vote.

Hawaii.

Hawaii is the other fully organized territorial possession. Prior to 1893 the Hawaiian Islands had a monarchial form of government with a native dynasty, but in that year a revolution abolished the monarchy and set up a provisional government which, in turn, gave way to a republic. Then, in 1898, the government of the Hawaiian Republic applied for and obtained annexation to the United States. Two years later Congress passed the organic act on which the present Hawaiian government rests. The territorial governor of Hawaii (who must be a resident of the islands) is appointed by the President of the United States. He is assisted in executive work by various administrative officials, a secretary, treasurer, attorney-general, and so on. All these, except the secretary, are appointed by the territorial governor with the concurrence of the Hawaiian senate. Subject to the terms of the organic act the Hawaiian legislature, consisting of two elective chambers (a senate and a house of representatives), makes the laws, determines the taxes, and provides for the annual expenditures. The governor possesses the usual right of veto, which may be overridden by a two-thirds vote of both Houses.

The appropriation safeguard.

In the organic act of 1900 there is, however, an important provision which reads as follows:

> "In case the legislature fails to pass appropriation bills providing for payment of the necessary current expenses of carrying on the government and meeting its obligations as the same are provided for by the then-existing laws, the governor shall, upon the adjournment of the legislature, call it in an extra session for the consideration of appropriation bills and until it shall have acted the treasurer may with the advice of the governor make such payments, for which purpose the sums appropriated in the last appropriation bills shall be deemed to have been reappropriated."

In other words, the territorial legislature cannot use its control of expenditures in such a way as to coerce the executive into submission by stopping the wheels of government. Hawaii also has its own territorial courts, likewise a federal district court. The voters elect one delegate to the House of Representatives at

Washington, but he has no vote there. All elections in Hawaii are by universal suffrage, but with one important reservation, namely, that voters must be able to "speak, read and write the English or the Hawaiian language." This shuts out a small number of the Japanese and Chinese who form a large element in the population of the islands.

Puerto Rico.

Puerto Rico, although legally rated as an unincorporated territory, has a form of government very similar to that of Hawaii. During the war with Spain the American army occupied this Caribbean island and in the two years following the withdrawal of the Spanish forces it continued under military government. People do not always realize how easy it is for an army to provide, out of its own resources, all the administrative machinery that is necessary for temporarily governing a conquered territory. The commander-in-chief with his staff transform themselves into a governor and council; the engineer corps provides a department of public works; the paymaster's department takes charge of the finances; the medical and sanitary corps become a department of public health; the judge-advocate sets up a judicial system; the military police take over the work of patrolling the streets, and so on. To say that Puerto Rico was for two years under military rule does not mean, therefore, that the affairs of the island were crudely or arbitrarily handled. The system of military rule did not quickly give way to an organized civil government because it was found to be inefficient but because of the general aversion of the American people to continued military government in any portion of their territory.

Present government of the island:

The present frame of Puerto Rican government has its basis in the Foraker act of 1900, considerably modified by the organic statute of 1917. This later statute conferred American citizenship upon Puerto Ricans and extended to them most of the constitutional rights of citizens in the United States, a notable exception being the right to trial by jury. At the head of the island administration is a governor, appointed by the President with the consent of the Senate. He holds office during the President's pleasure. The governor is assisted by several heads of executive departments, of whom two (the attorney-general and the commissioner of education) are appointed by the President, while the rest (including the heads of the departments of finance, interior, health, agriculture, and labor) are appointed by the governor. These heads

1. The executive.

of departments form an executive council, assisting the governor in an advisory capacity.

2. The legislature. The Puerto Rican legislature consists of two chambers, a senate and a house of representatives. The senate contains nineteen members, of whom two are elected from each of seven senatorial districts and five elected by the voters of the island at large. The house of representatives is composed of thirty-nine members, one from each of thirty-five districts and four elected at large. Puerto Rico has universal suffrage but with a literacy test for voting.

Its powers. The legislature may levy taxes (except taxes on imports) and may authorize borrowing on the credit of the island. It also determines the expenditures, but if the two chambers do not agree on appropriations for the support of the island government, the sums voted for the preceding year are deemed to have been reappropriated. The provision relating to the governor's veto power is a peculiar one. The governor may veto an act of the Puerto Rican legislature; then if the legislature reënacts it by a two-thirds vote the measure goes to Washington where it is laid before the President. If the President approves the measure, or does not disapprove it within ninety days, it becomes effective. All Puerto Rican laws are also subject to disallowance by Congress, as in the case of the other territories. But, as a matter of fact, Congress does not usually interfere. A resident commissioner from Puerto Rico, elected by popular vote, has the right to sit in the House of Representatives at Washington, but has no vote in that body.

The courts. Puerto Rico has a judicial system which includes a United States district court and a series of territorial courts headed by the supreme court of Puerto Rico. The judges and other officers of the United States district court are, of course, appointed by the President, while those of the territorial courts are named by the governor of the island and the Puerto Rican senate,—with the exception of the territorial supreme court, in which the five justices are also appointed by the President.

The Philippines. Then come the Philippines. By the treaty with Spain in 1898 the Philippine Islands were ceded to the United States. Military rule, complete or partial, continued for nearly three years. During this interval, however, a commission was sent to the islands to devise a system of civil government and also to take over some governmental functions from the military authorities. All this

was done by order of the President, who controlled the administration of the islands by virtue of his powers as commander-in-chief of the army. To remove any possible doubt as to the legality of this situation, however, Congress gave the President "all the military, civil and judicial powers necessary to govern the Philippines . . . until otherwise provided." Under this authority the President in 1901 appointed a civil governor and provided the islands with an appointive legislative body or commission made up of both Americans and Filipinos.

The law of 1902.

This temporary civil government functioned for about a year, that is, until Congress was able to prepare and enact an organic law for the islands, which it did in 1902. The chief provisions of this law were as follows: The executive power was to be vested in a governor-general, appointed by the President with the consent of the Senate, and in heads of administrative departments, similarly appointed. These administrative officials, along with four other appointive members, were to constitute the Philippine commission, which was to serve as the sole legislative body until conditions should warrant the election of an assembly; thereafter it was to function as the upper chamber of the legislature. The conditions were fulfilled, and the first Philippine assembly met in 1907.

The organic act of 1916.

Thus matters continued until 1916, when an organic act (commonly known as the Jones act) made three important changes in the government of the islands. It gave a larger degree of self-government, increased the powers of the governor-general, and replaced the Philippine commission by an elective senate. Under the terms of this act the chief executive power has been exercised by a governor-general, appointed by the President with the concurrence of the United States Senate. There has also been a vice-governor, similarly appointed, and serving as head of the department of public instruction. The heads of the other administrative departments (such as justice, finance, etc.) have been appointed by the governor-general with the approval of the Philippine senate. In addition the governor-general has prepared the annual budget and laid it before the Philippine legislature for its approval; but if the legislature did not make the necessary appropriations it was provided that those of the previous year should be deemed to have been reappropriated. The governor-general has also had the right to veto any action of the legislature and if the latter overrode this veto by a two-thirds vote the issue was then referred to Washington

where the President had six months in which to decide it. Congress, moreover, had a right under the Jones act to annul any law passed by the Philippine legislature. This legislature, during the past twenty years, has been made up of two chambers, a senate and an assembly, the membership of both being chiefly elective but with a few appointive members to represent the non-Christian districts.

The issue of independence.

The organic act of 1916 asserted the intention of the United States to recognize the independence of the Philippines "as soon as a stable government can be established therein." And during the next five years the Washington authorities gave the Philippine legislature an almost free hand. Governor-General Harrison, who served during this period, reported that the islands were fit for independence. But President Harding in 1921 and President Coolidge in 1926 thought it well to have the question looked into by special commissioners. In both cases these representatives reported that the islands were not yet prepared for an independent status although they might ultimately become so, and Congress tacitly accepted this view of the situation.

The independence act of 1934.

Nevertheless the clamor for independence continued and it was reinforced in the United States by various business interests which desired to have tariff duties placed upon imports (sugar, coconut oil, etc.) from the Philippines, as well as by American labor organizations which hoped that the granting of independence would put an end to Filipino immigration. Over the veto of President Hoover, therefore, Congress passed a measure (January, 1933) which provided that complete independence would be granted to the Philippines after a "preparative" period of ten years with a stipulation that the islands should be governed during this interval as a commonwealth under a constitution approved by the President of the United States and adopted by vote of the Philippine people. The law of 1933 provided that in order to become effective it would have to be accepted by the Philippine legislature within a year, but this body refused its approval and sought to obtain better terms. Failing in this, Congress was persuaded in 1934 to pass a new independence law (which differed but little from its predecessor) and this was accepted by the legislature in Manila.

The new Philippine Commonwealth.

Under the terms of this independence act the Philippine people at once elected a convention of delegates which framed a constitution for the Commonwealth of the Philippine Islands. This, after having been submitted to the President of the United States and

approved by him, was ratified at the polls by an overwhelming majority. Thereupon the officers of government under the new constitution were elected and took office in November, 1935. On their inauguration the governmental system which had been maintained in the Philippine Islands by the United States during the past twenty years came to an end. The new chief executive of the commonwealth government replaced the governor-general; but the independence act of 1934 provides that the President of the United States shall appoint a high commissioner to serve as the American representative in Manila. This official will keep Washington fully informed as to developments in the islands, but is to have no powers of any considerable importance.

The new régime.

On the inauguration of the Philippine Commonwealth all American civil authority in the islands terminated. Under the provisions of their new constitution the Filipinos assumed control of the government in all its branches, legislative, executive, and judicial. But their freedom from American control will not be complete by any means during the ten-year probationary period, for the independence act of 1934 makes a number of highly important reservations. In the first place it provides that all amendments to the Philippine constitution, and all laws relating to various important matters (such as currency and emigration) must be approved by the President of the United States before going into effect, and likewise that he may suspend, under certain circumstances, any law or executive order made by the Philippine government. This ensures a large measure of ultimate control in case the need should arise. Second, all the foreign relations of the Philippine Commonwealth during the ten-year period are to be under the supervision of the United States. Third, the United States Supreme Court will continue to hear appeals from the highest court in the islands, and, fourth, the United States reserves the right to retain and to garrison military and naval posts at its discretion.

Specific reserved powers.

A general reservation

In addition to these specific reservations it is provided that the United States may intervene at any time during the ten years in order to preserve the government of the Commonwealth, or to protect "life, liberty and property" in the islands, or to enforce the fulfillment of the government's obligations. These are reserved powers of vast implication. They are broad enough to justify the resumption of full control over the administration

of the islands by the United States if the need arises. Meanwhile the Filipinos are to continue in allegiance to the United States and are to be represented (as they have been) by two resident commissioners in the House of Representatives at Washington, but these commissioners have no right to vote on any question.

Trade relations.

The independence act includes various economic provisions. One of them places a definite restriction upon the immigration of Filipinos to the United States. Another sets a limit upon the quantity of certain island products (notably sugar and coconut oil) which may come into the United States without payment of duty. All imports in excess of the prescribed quotas are subjected to the regular customs tariff. Six years after the establishment of the Philippine Commonwealth, moreover, a progressive export tax is to be levied on all the products shipped to the United States within the duty-free quotas and the proceeds of this tax are to be used to liquidate the existing bonded debt of the islands. Then, when the ten years of probation have been satisfactorily completed, the independence act provides for the abolition of the duty-free quotas, and thereafter all imports into the United States from the Philippines are to be subject to the regular tariff unless a trade treaty is negotiated to make some different arrangement.

Naval depots and neutralization.

On July 4, 1946, therefore, if all goes well, the American military garrisons will be withdrawn from the islands; but the United States retains the right to maintain naval stations in the Philippines, if it so desires, notwithstanding that full independence has been granted. On the other hand the United States has agreed to negotiate with other nations for a general treaty to ensure the permanent neutralization of the islands. These two provisions would seem to embody an amazing inconsistency. If the United States retains any right to maintain a naval base in the Philippines it seems hardly conceivable that other countries would agree to regard this territory as neutral in the event of a war with the United States.

The Filipino attitude.

It may surprise some ardent Americans to know that the people of the Philippines, after all the United States has done for them during the past thirty-five years, should feel so desirous of parting company with their benefactors. The United States has spent over half a billion dollars on the islands since 1900, most of it for public improvements. American citizens have another quarter

of a billion invested there. Under American auspices industry and trade have been developed, a system of public education has been built up, and the people are vastly better off than they were under Spanish rule. Most intelligent Filipinos realize that the American people have befriended the islands; but this does not offset a natural desire to control their own government. For it is a universal rule that people of all races prefer government of their own manufacture, even though it may turn out to be misgovernment, as against any form of outside control, however beneficent and enlightened it may be.

Samoa and Guam.

Of the other outlying American possessions there is little that needs to be said. In Samoa, Guam, and certain other Pacific islands all governmental authority is vested in the hands of a commandant designated by the secretary of the navy. The commandant appoints a governor for each of the districts into which the islands are divided. Local government is left to the natives. Congress has thus far enacted no organic laws for these islands.

The Panama Canal Zone.

The Panama Canal Zone is a strip of territory across the isthmus about ten miles in width with the Canal in the middle of it. The United States acquired from the Republic of Panama in 1904 "the perpetual use, occupation and control" of this strip. Its administration is in the hands of a governor appointed by the President with the Senate's approval. Within the Canal Zone various courts have been established and town governments organized.

The Virgin Islands.

The Danish West Indies or Virgin Islands, which were purchased by the United States in 1917, have been placed by Congress under the control of a governor and such other officials as the President may appoint with the Senate's approval. The President has been given authority to fix the respective powers of these officers.

Relations with Cuba and other Caribbean republics.

Unlike Great Britain and France the United States has no protectorates, that is, territories which are independent but under American protection. Nevertheless, by various treaties with certain Caribbean islands and Central American republics there has been established from time to time what virtually amounted to a protectorate. With Cuba, for example, there existed for many years an arrangement for American intervention under certain conditions, and in 1906 such intervention took place as a means of preserving order.[1] The Cuban administration was then kept in the hands of American officials for more than two years. But

[1] H. F. Guggenheim, *The United States and Cuba* (New York, 1934).

in 1934 this arrangement for intervention was brought to an end. Agreements have also been made with Haiti, Santo Domingo, and Nicaragua which provide that the United States may intervene when necessary to secure the adequate protection of foreign property or the holding of honest elections. These agreements have led to intervention on several occasions but the general sentiment of the country seems to be against such action.

The agencies of home supervision.

In the government of the United States there is no minister or secretary for the colonies, as in France and Great Britain. Alaska, Hawaii, Puerto Rico, and the Virgin Islands are supervised by the secretary of the interior. In 1934 a division of territories and island possessions was created by executive order in this department to have immediate charge of them. The Canal Zone continues under the supervision of the bureau of insular affairs in the war department. The same is true of the Philippines so far as any supervision continues to be exercised. Samoa, Guam, and the smaller Pacific islands are under the secretary of the navy. This division of supervisory jurisdiction is anomalous but it results from the fact that the United States has never had what may be called a colonial policy.

The District of Columbia.

The District of Columbia occupies a unique position in the governmental system of the United States. It is neither a state nor a territory, but by virtue of its being the national capital has been placed by the constitution directly under the control of the federal government. From the beginning of the Revolutionary War to the formation of the constitution, Philadelphia served as the continental headquarters save for short intervals when the city was occupied by the British (1777–1778) and again in 1783 when the Congress of the Confederation was driven from its meeting place by a band of Revolutionary soldiers clamoring for their pay. This latter incident carried its lesson to the members of the constitutional convention in 1787. While they were not ready to designate any city as the permanent seat of the new federal government, lest by so doing they might stir up sectional jealousy and perhaps lead to the rejection of the whole constitution, they did make provision for the eventual selection of a capital which could be placed under the control and protection of the national authorities.[1]

Early vicissitudes of the federal capital.

At Madison's suggestion, accordingly, the constitution was

[1] Article I, Section 8.

worded to provide that Congress should have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The selection of the exact place was left for the future, but with the stipulation, as indicated above, that the territory acquired for the new capital should pass outside the jurisdiction of any state.

What the constitution provides.

When the first Congress of the United States met in 1789, after the adoption of the constitution, there was a long and bitter struggle on this question, particularly between representatives of the northern and the southern states. Each wanted the capital located in its own region. In the end it was agreed to accept a location on the Potomac, which was in reality a victory for the South. The selection resulted from a deal between the sectional leaders and was connected with the proposition to have the new national government assume the debts which the several states had accumulated during the struggle for independence. At any rate, the District of Columbia became federal territory and the seat of government was moved there in 1800.

Choice of the Potomac location.

For a time the District was permitted to have its own system of local government, with officials elected by the inhabitants, but there was so much extravagance and inefficiency that Congress ultimately decided to intervene, which it did with a drastic hand by abolishing local self-government within the District and providing that the area should be administered by an appointive commission.

The administration of the District of Columbia is vested, therefore, in a board of three commissioners. Two of them are appointed by the President, with the consent of the Senate, from among the residents of the District. They hold office for a three-year term, and one must be chosen from each of the two leading political parties. The third commissioner is detailed by the President from the engineer corps of the United States army. He must be an officer with the rank of captain or higher rank, but is not detailed for any definite term. Subordinate officers of the engineer corps are assigned to assist him.

Present administration: The commissioners.

These three commissioners of the District of Columbia, as a body, have large powers. They make all municipal appointments, supervise the local public services such as streets, water supply,

Their powers.

police and fire protection, and have power to make the ordinances or regulations relating to the protection of life, health, and property. Each member of the commission takes immediate charge of certain departments; for example, the engineer member has charge of streets, water supply, sewerage, parks, and lighting. In a word, they exercise the functions which in many cities of the United States are given to the mayor, the heads of municipal departments, and the city council. The school system, however, is managed by a board of education, the members of which are appointed by the judges of the supreme court of the District of Columbia.

The laws and the appropriations, how made.

The laws applying to the District of Columbia are practically all made by Congress, although usually on the commission's recommendation.[1] So also are the appropriations for carrying on the government of the District. The commissioners each year prepare their estimates of what is required and submit them to a congressional committee. After this committee has considered the figures, and changed them as it sees fit, an appropriation act embodying them is passed by Congress. A share of the annual cost of governing the District, as thus appropriated, is paid from the national treasury; the remainder is levied upon the District by taxation.[2] A large amount of property in the District belongs to the national government and is exempt from taxation. That is why the national treasury bears part of the cost.

Absence of local autonomy.

The legal residents of the District of Columbia are entirely disfranchised. They have no vote for President, since the District is not entitled to any presidential electors. They have no senators, no representatives in Congress, no mayor, aldermen, or councillors. The only way in which any inhabitant of the District of Columbia ever manages to cast a ballot is by being a legal resident of some other place. That is the way many of them arrange it. When men are appointed to federal positions which involve their living in Washington, they often retain their legal residences in the states from which they come, and go back to these states to cast their votes on election day. In some cases they are permitted to vote by mail. But there are many thousands who are domiciled in Washington and have no such opportunity. They pay taxes regularly but they have no representation either in the national

The anomaly of the situation.

[1] Congress devotes the second and fourth Monday of each month, during its session, to District of Columbia affairs.

[2] The national government's contribution in recent years has been about twenty per cent of the total District expenditures.

government or in the management of their own local affairs. The government of the District of Columbia thus affords a striking illustration of how the American people manage to maltreat one of their traditional axioms, namely, that there should be "no taxation without representation."

Efficiency of the District's government.

But as a practical matter the people of the District are better off than they would be if Congress allowed them to elect their local officers and to pay all their own municipal expenses. Their wishes are consulted through an advisory council of citizens. Public hearings are held on all proposals of any importance. Washington is a well-governed city, in fact it is probably the best governed of the world's capitals. Its administration has been free from serious scandal or corruption for more than sixty years. Local self-government would increase the municipal tax rate and the people of the District would probably get less for their money than they do under the present system.

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CHAPTER XXIX

THE JUDICIAL SYSTEM OF THE UNITED STATES

Laws are a dead letter without courts to expound and define their true meaning and operation.—*Alexander Hamilton.*

The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other nation.—*Albert Venn Dicey.*

The need of a strong judiciary.

A federal system, to be successful, must have a strong judiciary. It must have courts which are able to command the acquiescence of both governments and people. For federalism by its very nature implies a division of authority between the nation and the states, with the certainty that disputes concerning the exact range of their respective powers will arise. A strong judiciary is needed to settle such controversies.

The makers of the constitution agreed (as one of them expressed it) that a national government without its own judiciary would be "a mere trunk of a body, without arms or legs to act and move." Hence by deliberate action they provided for a Supreme Court that would be supreme. And the wisdom of this action has been demonstrated by the way in which this court has guided American constitutional progress. It may fairly be said, indeed, that the development of the United States Supreme Court into a final arbiter of constitutional disputes is one of America's most important contributions to the science of government.

What the constitution provides.

Lord Bryce tells of an educated Englishman who heard that the Supreme Court of the United States had authority to override the laws of Congress and spent two hours reading up and down the constitution in a hunt for that particular provision. It is not surprising that his quest proved vain, for the constitution has nothing to say on that point and very little about the powers of the federal judiciary in any other connection. It provides for a Supreme Court, but leaves the organization of that tribunal entirely to Congress. It likewise protects the judges against improper removal and guarantees that their salaries shall not be reduced. But it is far less explicit with reference to the rights, powers, and

organization of the judiciary. This was not because the makers of the constitution failed to recognize the importance of such matters. They were well aware of it. But they were of different minds as to whether any courts other than a Supreme Court ought to be established, and if so, how such courts should be organized. Hence they contented themselves by providing that the judicial power of the United States should be vested in a Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish."

Why federal courts were deemed necessary:

Why were the makers of the constitution so insistent on creating a new and independent federal judiciary? There were plenty of state courts already in existence. Why not leave all judicial controversies to them? That is what had been done under the confederation, before the constitution was framed. And that is exactly why everyone was anxious to do something different. The old arrangement had proved unsatisfactory to everyone, and its continuance under the new government would likely prove even more so. For disputes between the states would probably become more frequent in the future and there would be need for an impartial umpire, standing outside them all, to settle these controversies. Likewise, there would be questions bearing on the relations of the United States with foreign nations, on matters covered by treaties, for instance, which could not safely be left to the state courts. To leave them there would be to place the reputation and the peace of the whole Union at the mercy of thirteen different conflicting authorities. Controversies would also keep arising between citizens of different states, and experience had disclosed the all-too-frequent tendency of state courts to favor their own citizens.

1. To decide certain controversies.

2. To secure a uniform interpretation of the national laws.

But most important of all, disputes were certain to arise as to the meaning of various provisions in the new constitution and also with respect to the interpretation of laws passed by Congress. By whom should disputes be decided? To leave them to the various state courts would be to invite chaos. Each might render a different decision, so that the constitution and the federal laws would mean one thing here and another thing there. The makers of the constitution decided, therefore, that there would have to be at least one coördinating tribunal, a distinctively federal court, supreme and independent of the states.

"If there are such things as political axioms," wrote Alexander Hamilton, "the propriety of the judical power of a government being

coextensive with its legislative, must rank among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. . . . Any other plan would be contrary to reason, to precedent, and to decorum. . . . All nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice."

Were two complete sets of courts needed?

These reasons, however, did not necessitate the creation of a whole ladder of federal courts. One Supreme Court would have sufficed to maintain the federal supremacy and to ensure the uniform interpretation of the laws, leaving to the state courts the function of hearing all cases in the first instance. And indeed the constitution does not require that there must be any other federal courts than the Supreme Court. It leaves that matter to the judgment of Congress. Might it not have been possible, then, for Congress to have refrained from establishing subordinate federal courts and to have empowered the state courts to take cognizance of cases falling within the judicial power of the national government? Some of those who helped frame the constitution appear to have thought so. Hamilton pointed out that the power "to constitute tribunals inferior to the Supreme Court" was "intended to enable the national government to constitute or *authorize* in each state or district of the United States a tribunal competent to the determination of matters of national jurisdiction within its limits." [1]

Hamilton's view.

Madison's view.

But Madison thought differently. His belief was that unless lower federal courts were established throughout the Union with a certain amount of final jurisdiction there would be a multiplication of appeals from verdicts in the state courts. At any rate Congress decided that it would be better for the new national government to have its own courts from the lowest to the highest, and on the whole this decision has proved to be a wise one. It was also the safest course because the Supreme Court subsequently decided that Congress had no power to confer jurisdiction on any courts not created by itself.[2] But with respect to those courts (other than the Supreme Court) which Congress does establish, its powers are extensive. It may give or take away jurisdiction, determine the number of judges, control the procedure, or even abolish a court altogether.[3]

[1] *The Federalist*, No. 81. The word "authorize" is italicized in Hamilton's article.

[2] Houston *v.* Moore, 5 Wheaton, 1.

[3] When Congress abolished the federal circuit courts in 1911 the judges were retained as members of the circuit court of appeals, thus protecting their constitutional tenure.

Federal Jurisdiction

The sphere of the federal courts.

Before the structure and powers of the various federal courts are explained, it may be well to notice the division of jurisdiction between the federal courts, taken as a whole, and the state courts. The federal courts have jurisdiction over certain classes of controversies named in the constitution; the state courts have jurisdiction over all others. And the cases over which the federal courts have jurisdiction cannot be more concisely summarized than by quoting the words of the constitution itself:

> "The judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects." [1]

As a model of concise legal phraseology this paragraph is probably unsurpassed in the whole range of constitutional literature. If anyone has doubts on this score let him try to recast the paragraph in his own words. But the very compactness of the wording makes some explanation necessary in order that the full force and effect of these provisions may be properly understood.

1. Cases arising under the federal constitution, laws, and treaties.

First is the reference to cases arising under the constitution and under the laws or treaties of the United States. What does this mean? It means, to begin with, that only cases of a *justiciable* character can come before the courts. The judiciary cannot decide executive or legislative questions. For example, the courts will not pass upon the question whether a foreign government is entitled to recognition by the United States, or whether the United States is at war with another country. These questions are for the executive branch of the government to determine. But the provision also means that whenever a controversy involves the interpretation of a provision in the national constitution, or in a federal law, or in a treaty to which the United States is a party, the issue is one which the federal courts have full authority to determine. Anyone who claims a right under the constitution, laws, or treaties of the United

[1] Article III, Section 2.

States may claim it in the federal courts. Or, as the Supreme Court once declared:

> "The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily inspired by and under the constitution and laws of the United States." But the right must be a substantial and not merely an incidental one in order to warrant its assertion in the federal courts. "It must appear on the record . . . that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained."

Some illustrations.

To take some illustrations: If a person or corporation is being prosecuted in any state court on grounds which seem to infringe any substantial right guaranteed to them by the federal constitution (for instance, the right not to be deprived of life, liberty, or property without due process of law), they may seek relief by having the case carried to the federal courts. Or if any law made by Congress is being applied, controversies relating to it may come to the federal courts. Or, again, if a foreign citizen claims that rights given to him by treaty are denied by any state of the Union, he may come to the federal courts for the enforcement of his claims. Whenever, in fact, one of the parties to a suit asserts that he has a substantial right which arises from the national constitution, federal laws, or treaties, this brings the matter potentially within the judicial power of the United States.[1]

2. Cases affecting ambassadors, other public ministers, and consuls.

Again the judicial power of the national government extends to all cases affecting foreign diplomats. A diplomatic agent of a foreign state is by international law immune from prosecution in the courts of the country to which he is accredited. This provision of the constitution merely operates, therefore, to keep the state courts from a possible infringement of international law. If an ambassador or other public minister of a foreign state commits an offense his recall may be requested, or he may even be expelled; but so long as he remains an accredited diplomat his freedom from legal process is guaranteed. This rule as to diplomatic immunity has been recognized from ancient times.

By "admiralty and maritime" jurisdiction is meant authority over cases which relate to American vessels travelling on the high

[1] But not necessarily within the exclusive jurisdiction of the federal courts. See *below*, p. 514.

3. Admiralty cases.

seas or in the navigable waters of the United States. Such, for example, are controversies regarding freight charges, seamen's wages, damages due to collisions, and marine insurance. In time of war it also covers cases relating to prize vessels captured at sea. Admiralty law is a distinct branch of jurisprudence, differing both in substance and in procedure from the common law and equity of the regular courts. For that reason, and also because foreign commerce was placed within the regulating power of the national government, it was deemed wise to vest admiralty jurisdiction in the federal courts.

4. Cases in which the United States or a state of the Union is a party.

Likewise the federal courts have jurisdiction whenever the United States is one of the parties to a suit, either plaintiff or defendant, or whenever the controversy is between two states of the Union, or between "a state and a citizen of another state." The first two clauses of the foregoing sentence are perfectly clear and have given rise to no difficulty, but the third (the one in quotation marks) is ambiguous. Does it mean that a state of the Union may be sued in the federal courts by a citizen of some other state? Does it mean, for example, that if you are a citizen of New York you can sue the Commonwealth of Kentucky in the federal courts?

The suability of a state.

A dispute on this point arose soon after the constitution went into effect, and in a noteworthy decision the Supreme Court ruled that such suits might be maintained.[1] The sovereign state of Georgia, it held, could be sued in the federal courts by a citizen of South Carolina. This ruling was a surprise, because it had been openly asserted, when the constitution was before the states for acceptance, that no state would be amenable to the suit of an individual without its own consent. But the Supreme Court, in making its adjudication, followed the literal wording of the constitution which plainly allows such a construction.

The Georgia case.

Georgia thereupon set up a loud wail of protest, and the other states joined her. They denounced the decision as an impairment of their sovereignty and an affront to their dignity. Of course the states had good grounds for this protest inasmuch as the principle that a sovereign state is not liable to be sued without its own consent had been recognized from time immemorial. Blackstone spoke of it as "a necessary and fundamental principle." So the states demanded that the constitution be amended in such way

[1] Chisholm *v.* Georgia, 2 Dallas, 419 (1793).

as to make this principle clear, and in 1798 the eleventh amendment set the matter right.

The eleventh amendment.

By the terms of this amendment the federal courts are expressly forbidden to take cognizance of any suit brought against a state "by a citizen of another state, or by citizens or subjects of any foreign state." Anyone who desires to sue a state must bring his suit in the state's own courts, and these courts will not entertain such suits unless they have been authorized to do so, in other words unless the state legislature has consented. The states do, as a matter of fact, permit themselves to be sued in their own courts under prescribed conditions. But a state may be sued in the federal courts only by the United States, or by a foreign state, or by another state of the Union.

May state officials be sued in the federal courts?

While the doctrine that no state may be sued in the federal courts by its own citizens, or by citizens of another state, or by foreign citizens is now well established, the question whether the officials of a state are equally immune is by no means so clear. In general the Supreme Court has endeavored to determine whether the suit is really against the state through one of its officers, or whether it is against a state officer as an individual. In the former case it will not assume jurisdiction; in the latter it has maintained its right to entertain suits against those who, "while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs under color of authority."

5. Controversies between citizens of different states.

Finally, the jurisdiction of the federal courts extends to all controversies between foreigners and American citizens, and between citizens of different states. It is cases of this sort that bring the largest grist to the federal mills. A corporation or company is presumed for purposes of jurisdiction to be a citizen of the state in which it was chartered or incorporated, although it may be doing the larger part of its business in other states. When a corporation brings a suit, or a suit is brought against a corporation, the chances are, therefore, that the two suitors will be of diverse citizenship. But diversity of citizenship does not of itself entail the bringing of a suit in the federal courts, for the national laws provide that all such cases shall be left to the state courts if no question of federal right is involved and if the amount in controversy does not exceed a certain sum. This action has been necessary to protect the federal courts from being overwhelmed by a flood of trivial suits between litigants of different state citizenship.

Federal jurisdiction is not always exclusive.

When the constitution provides, therefore, that the judicial power of the United States shall extend to various classes of controversies, it does not mean that the federal courts must assume *exclusive* jurisdiction in all such cases. Congress determines how far the exclusive jurisdiction shall extend; it may give to the federal courts the whole field or only a part of it. Thus far Congress has given the federal courts exclusive jurisdiction in all suits to which the United States is a party, all suits between two states, all suits between a state and a foreign nation, and certain civil suits arising under the national laws. In all other cases the state courts have been permitted by Congress to assume concurrent jurisdiction. That is, the plaintiff has the option of commencing the suit in a federal court or in the courts of his own state, or in the courts of a state where the defendant resides. This option is subject, however, to the limitations mentioned toward the end of the preceding paragraph.

Difficulties on the subject.

Let no one imagine, then, that the sinuous line which marks off the jurisdiction of the federal courts is easy to follow. Nothing in the whole range of American government is more difficult. The division of jurisdiction between the two sets of courts is in fact so indistinct at some points that even good lawyers are not always sure of their ground. And as for the ordinary layman he is often quite bewildered by the strange things which result from the divided judicial authority. An employee of a national bank embezzles a sum of money; he is arrested by a United States marshal, prosecuted by a federal district attorney, tried in a federal court, sentenced to a term in a federal penitentiary, and then pardoned by the President of the United States before his term is out. Directly across the street an employee of a state bank or trust company embezzles the same amount; but he is tried in a state court, given a different sentence, sent to a state prison, and applies to the governor for a pardon. This seems quite inexplicable to the man in the street, but the simple explanation is that both the nation and the states have an equal right, through their own officials, courts, and penal institutions, to administer and enforce their own laws.

Summary.

By way of summary, therefore, it may be stated that every suit which appears on the docket of a federal court has been placed there for one of two reasons. In the first place it may be there because the suit raises a "federal question," that is, some

issue that involves the constitution, laws, or treaties of the United States. If such an issue is involved, the suit may come to the federal courts no matter who the contending parties may be. But in the second place the suit may be brought in the federal courts, irrespective of the issue, by reason of the status of the suitors, for example, because it is a suit between two states, or because the individual suitors are citizens of different states. Either of these circumstances can bring a suit into the federal courts, but it must be one of the two.

Law and Equity

The law and equity of the United States.

So much for the general jurisdiction of the federal courts. What jurisprudence do they administer? They administer both law and equity. Law, speaking broadly, is made up of two branches, the common law and statutes.[1] The former is the oldest branch of American law. Its development began in mediaeval England when there were few written rules. In those early days the royal courts decided cases, so far as they could, in accordance with the unwritten usages or customs of the people. Gradually, however, the decisions of the courts in such matters grew more and more uniform, until this judge-made law or body of usages became "common" to the whole realm of England, although it had never been enacted as the law of the land by any parliament or other lawmaking body.

The two branches of law: 1. The common law.

Its history in England.

But it is not to be assumed that the common law stood unstirred and changeless on its mediaeval pedestal. Developing in accordance with the needs of each successive generation, it broadened down from precedent to precedent, thus adapting itself to the genius of the Anglo-Saxon race. In the course of time, moreover, this system of common law was reduced to written form by various great text-writers or commentators, Glanvil, Bracton, Littleton, Coke, and Blackstone.

Its transplantation to America.

During the colonial period the common law followed the flag across the Atlantic. Its principles and procedure were applied by the judges in the American colonies. The Declaration of Rights adopted by the first Continental Congress in 1774 spoke of it as a heritage. "The respective colonies," it asserted, "are

[1] Occasionally they also administer "admiralty law" a code of maritime rules inherited from England which has been considerably modified by acts of Congress, and they also apply the rules of international law when the need arises. See Charles Pergler, *Judicial Interpretation of International Law in the United States* (New York, 1928).

entitled to the common law of England." When the thirteen colonies shook off British political control, therefore, they did not root out the common law. On the contrary they retained it, and it still persists as the foundation of the legal system in the nation and in all the states but one. Only in Louisiana did the common law fail to get an initial foothold. There, through the colonization of the country by the French, the jurisprudence of France became the basis of the present legal system. Even in Louisiana, however, trial by jury and other common law institutions have been superimposed upon the old legal framework and have greatly modified it.

Its development there.

But although the common law of England remains the basis of the American legal system, it has ever kept growing and changing, widening, and narrowing in the New World as in the Old. This steady transformation of the American legal system has been accomplished in part by judicial decisions but in larger measure by the enactment of statutes which have modified or even supplanted the rules of common law on many matters. A statute or act of a legislature may merely reënact with slight changes what has been the common law, or it may entirely set some rule of the common law aside. Where the common law and a statute are inconsistent the statute always prevails. "Reason is the life of the law," said Coke, and when any rule of the common law seems unreasonable or out-of-date the legislature intervenes to modify or supplant it by statutory law.

2. Statutory law: what it is.

Statutory law, as distinguished from common law, is law made by some regular lawmaking body. It may be framed by a constitutional convention, in which case we call it a constitution. By far the greater part of statutory law is made, however, by Congress, by the state legislatures, and by municipal councils. The output of these bodies is called laws, acts, statutes, and ordinances.[1] Most of these enactments deal with matters which the common law does not cover at all—with things that require legal regulation because of the complexities of our modern social and economic life. Because of this increasing complexity the production of statutory law by Congress, by the forty-eight state legislatures, and by the thousands of subordinate lawmaking bodies has developed to enormous proportions and it keeps increasing year by year.

[1] The terms "laws, acts, and statutes" are usually confined to the enactments of Congress and the state legislatures, while the term "ordinances" is used to designate the enactments of municipal councils and other subordinate lawmaking bodies. In towns and townships they are often called "by-laws."

Its scope and importance.

Accordingly, this branch of law now forms by far the larger part of American jurisprudence as a whole, but its importance is not commensurate with its bulk. These thousands of statutes have supplemented the common law, filled in the gaps, and altered it at times; but they have not made it cease to be an underlying force in the legal system of the country. No lawyer is a well-trained lawyer unless he has mastered the principles of the common law. In the law schools it is common law, for the most part, that teachers teach and students study. Some states have enacted comprehensive codes of law (a criminal code, a civil code, a code of procedure, etc.) which ostensibly supersede the common law, but even in these "code states" a great deal of common law remains operative. For it is the rule in such states that wherever the codes fail to cover a matter, the common law applies, and this leaves a lot of work for the common law to do.

Superiority of the common law.

The common law is an old standby; it has done valiant service for many centuries. But it tends to lag behind the needs of the time. Lawyers and judges are inclined to look upon legal principles as fixed and absolute. When new situations arise they try to meet them by merely stretching the old legal formulas. This is a slow method of development and the people get impatient with it. They call on Congress and the legislatures to hurry the process by passing some new and drastic statute which is sometimes poorly thought out and hence works badly. Nothing is easier to make than an unworkable statute, and nothing is harder than to execute it. The art of government is largely the trick of adapting laws to the foibles of mankind. Time and circumstance can usually perform that trick more deftly than it can be done by the self-confident politicians of a legislature. "Common law is common sense," runs an old saying. A good deal of our statutory law is not.

Equity: what it is.

The constitution speaks of the federal courts as being entitled to jurisdiction "in law and equity." What is equity? To explain the substance, procedure, and limitations of equity jurisprudence would take far more space than can be accorded to that subject in any general book on American government. The layman thinks of "equity" as something associated with abstract justice or the conscience of the court. Many people have an idea that a judge gets his law out of a book and his equity out of a soft heart. Of course there is no basis for this idea. Equity comes out of books just as the law does. It embodies a formal set of rules which must

be applied by the court with an unfaltering hand, even as laws are applied, and with very little room for the play of a judicial conscience. It is merely a special branch of the law.

Its origin. The origins of equity are interesting. In mediaeval England there grew up, side by side with the common law, a system of rules administered by a special royal court, the court of chancery, which aimed to give redress to individuals in cases where the common law afforded such redress inadequately or not at all. Suitors who felt that they could not get justice in the regular law courts petitioned the king, as the fountainhead of justice, to intervene on their behalf. Being busy with other things the king referred these petitions to his chancellor who presently built up a court for considering them. This court of chancery became the "keeper of the king's conscience" and its intervention at the outset was confined to granting relief from the legal consequences of accident or mistake. Every such case was adjudged on its own merits. Gradually, however, definite principles or rules were evolved to cover all cases of the same sort. In the course of time these rules were reduced to written form; and taken together they became known as equity.

Its development.

Equity came to the American colonies with the common law. It was retained after the Revolution and has been developed. Today both law and equity are usually administered by the same courts. The differences between the two are numerous and technical, but in general equity applies only to certain classes of civil actions and never to criminal cases; its procedure is simpler; a jury is not ordinarily used to determine the facts at issue, and its remedies are more direct. A suit at law, for example, is a request for an award of damages; a petition in equity usually asks for a decree or for an injunction, that is, for an order specifically compelling a person to do or not to do a thing. Over some matters equity has exclusive jurisdiction; over others its jurisdiction is concurrent with that of the law. Equity is commonly used as a means of preventive justice, that is, to secure action before an injury is done. If someone comes and proceeds to cut down a fine tree in front of your house you can let him go ahead and then sue him for damages. But if it is the tree, not a sum of money that you want, equity can preserve it for you, and quickly. A court having equity jurisdiction can issue an injunction in five minutes and telephone it to the nearest police station before the axe gets busy.

Its nature.

The federal courts, within the fields of jurisdiction allotted to them by the constitution, administer both common and statutory law, and equity as well. The statutes which they apply are for the most part acts of Congress, but very frequently (as in the case of controversies between two states or between citizens of different states) the work of the federal courts is concerned with the interpretation and application of state laws. In such cases, if the state courts have already given an interpretation of the law concerned, the federal courts will ordinarily accept it. But the rules of equity, as applied by the federal courts, are determined by these courts for themselves. They do not necessarily follow the equity jurisprudence of the state in which the case arises.

All branches of law are administered by the same courts.

Judicial Procedure

The procedure of the federal courts, including their rules of evidence, the regulations concerning appeals, and all other matters relating to their actual work are left by the constitution to the discretion of Congress. These matters were covered to some extent by the judiciary act of 1789 and by the various amendments to that statute, all of which were revised and codified by a general law in 1911. But on many minor points of procedure Congress has empowered the courts to make their own rules.

Congress controls the procedure of the federal courts

The constitution, however, contains many limitations upon this power of Congress to regulate the procedure in the federal courts—limitations designed to ensure fair trials and to preclude injustice to any of the parties. These limitations, which are for the most part set forth in the bill of rights (the first ten amendments), relate to such matters as grand jury hearings, jury trials, promptness and publicity in judicial proceedings, second jeopardy, self-incrimination, the issue of search warrants, and the nature of punishments. They apply to the federal courts only and do not govern procedure in state tribunals. But this, as has already been pointed out, is not a matter of great practical consequence because each state constitution has its own bill of rights with very similar provisions and these apply to the state courts.

But subject to various limitations.

No one may be held to trial in a federal court for any "capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." [1] A grand jury is a body of men, not exceeding

Nature of these limitations:

[1] Amendment VI. An "otherwise infamous crime" has been construed to be one to which a penalty of imprisonment for more than one year is attached. The

1. The need of grand jury action. What the grand jury is and does.

twenty-three in number, selected by lot or by some other established procedure, and sworn to discharge impartially the duty of investigating all alleged offenses which may be brought to their attention by the prosecuting officers of the government. In other words the grand jury (aided by the district attorney or prosecuting attorney) conducts an investigation, not a trial. Witnesses are summoned before it and sworn, but no defense is presented and no counsel for the accused has any right to appear before a grand jury although such a privilege may be allowed. If the grand jury finds that there is a *prima facie* case against any person, it returns a "true bill" or indictment against him and he is held for trial. If, on the other hand, it finds no reasonable ground for holding the suspected person for trial, it returns "no bill" and he is discharged. A grand jury may undertake investigations on its own initiative, and occasionally it does conduct an inquiry into the actions of some public officer or the conditions existing in some public institution. Its report in such cases is known as a presentment.

2. The requirement of jury trial.

In all criminal cases (except impeachments) and in all civil suits at common law, where the amount involved is more than twenty dollars, the national constitution requires that trials in the federal courts shall be by jury.[1] This jury, in criminal cases, must be selected from the state or district in which the crime is alleged to have been committed. If the offense is committed outside the limits of any state, the trial may be held and the jury selected wherever Congress shall by law direct. And no question of fact (as distinguished from a question of law), when tried and determined by a jury, may be retried in any higher court except by the same methods. No higher court, sitting without a jury, can ordinarily set aside any conclusions of fact reached by a jury in a lower court. The Supreme Court of the United States, for example, sits without a jury. Consequently it hears arguments on disputed points of laws only; it does not reopen a controversy as to the facts.

Scope of this requirement.

The term trial by jury, as used in the constitution, means a jury trial in accordance with the rules of the common law. The right of trial by jury is guaranteed only to the extent that the

constitution makes an exception to the grand jury requirement in the case of the military and naval forces. The distinction between presentment and indictment is now of no practical importance.

[1] The constitutional right to a jury trial is one which may be waived in the case of misdemeanors (but not of felonies) by the consent of both parties.

common law has traditionally required it. Accordingly there is no constitutional right to a jury trial in equity cases, or in cases involving contempt of court, or in cases where aliens have been ordered to be deported for illegal entry, and so forth.[1] The right to a jury trial in criminal cases, moreover, can be waived by the defendant. Lest there be any misunderstanding, let it be repeated that the guarantee of trial by jury, as embodied in the Constitution of the United States, extends only to cases in the federal courts. It does not assure anyone a jury trial in the state courts on any question whatsoever. That is a matter for the state constitutions and laws to settle.

What a trial jury is and does.

A trial jury is a body of twelve qualified persons, selected either by lot or in accordance with other legally established methods, and sworn to try impartially a particular case, rendering a true verdict thereon in accordance with the evidence. It is usually required that persons called for jury service shall be qualified voters but there is no necessary connection between the right to vote and the obligation of jury service. Certain classes of persons are exempt by law from the obligation to serve on juries; the exemptions usually include physicians, attorneys, public officials, teachers, and persons in the military and naval service. Persons summoned to serve at each term of the court are known as veniremen, and they form a panel from which the twelve jurors are selected after due inquiry has been made concerning their impartiality and competence. The parties to the trial have the right to challenge any member of the panel for stated cause. The right to challenge peremptorily, that is, without assigning any cause, is also granted under certain limitations. The selection of the jury is complete when twelve persons, against whom no valid challenge has been interposed, are duly sworn and assigned to places in the jury box.

Functions of the jury.

A trial jury hears such evidence as the presiding judge permits to be presented. The admissibility of evidence is a matter of law for the judge, not for the jury, to decide. But the value of the evidence, when once admitted, is a matter of fact for the jury to determine. Most suits at law resolve themselves into questions concerning the relative credibility of evidence submitted by the

[1] It is permissible, however, for Congress to provide for a jury trial in such cases if it sees fit, and it has provided for jury trials in cases of indirect contempt growing out of injunctions issued in labor troubles.

opposing sides. When the evidence has been presented and the arguments of counsel heard, the judge instructs or "charges" the jury on their legal duties and on matters of law; and in the federal district courts he may also give his own opinion as to the weight of the evidence on any matter in controversy. This last point deserves emphasis because in many of the state courts a judge is not permitted to make any comment on the weight of the evidence.

The verdict.

Jury verdicts in the federal courts must be unanimous.[1] If the jury fails to reach unanimity after prolonged deliberation it reports a disagreement and is discharged. Then the case has to be tried all over again unless the federal prosecutor decides that there is no likelihood of a conviction and consequently drops the case. This the prosecution has a right to do with the approval of the court. A presiding judge may set aside a unanimous verdict if he finds that the jury has disregarded his rulings on points of law, or if he is satisfied that the verdict is clearly against the weight of the evidence, or if there has been any serious irregularity in the methods by which the jurors have reached their verdict. In such cases the presiding judge cannot himself render a different verdict, but merely orders a new trial.

3. Other securities for fair trials.

Certain other essentials of procedure in the federal courts are prescribed by the constitution. It is required that trials shall be speedy and public, that a person charged with crime shall be informed of the nature of the accusation; that he shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor; and that no person in any criminal case shall be compelled to be a witness against himself. Finally, an accused person is entitled to have the assistance of counsel in his defense. Excessive bail must not be required, nor cruel and unusual punishments inflicted. In searching for evidence no warrant may be issued, except upon probable cause supported by oath and definitely describing the place to be searched or the persons to be arrested.[2] All these requirements are imposed by the supreme law of the land and Congress has no power to set any of them aside. But they apply to the administration of justice in the federal courts only and have no relation to

[1] In some state courts a majority suffices to secure a verdict in civil trials. For a discussion of the jury system in state courts see *below*, Chapter XXXIX.

[2] For a detailed discussion of these various judicial limitations see John M. Mathews, *The American Constitutional System* (New York, 1932), pp. 339–357.

the procedure of the state courts except insofar as they have been copied into the state constitutions, or except to the extent that infringements may involve a denial of "due process of law" under the national constitution.

Twice in jeopardy.

The constitutional protection of all accused persons against "second jeopardy" requires a word of explanation. "No person," the constitution provides, shall be subject "for the same offense to be twice put in jeopardy of life or limb." [1] The application of this rule is that where a person accused of crime has been tried in a federal court, and a verdict rendered, he cannot be again tried by any federal court for the same offense unless with his own consent. If the verdict is one of acquittal it matters not that new evidence has been discovered; the first trial is conclusive and the matter cannot be reopened. When an accused person is acquitted, moreover, the government has no right of appeal to any higher court on the ground that the trial was not fairly conducted. But if an accused person is convicted an application for a new trial on this ground can be made on his behalf.

Limited scope of the jeopardy rule.

Instances arise occasionally in which the same act may be made the basis of two distinct accusations and trials, without placing a person twice in jeopardy, as, for example, the passing of counterfeit money, which is a statutory offense under the laws of the United States and is also a fraud under the laws of a state. Selling shares in a fraudulent enterprise is an offense against the laws of the states and if it is done in interstate commerce or through the mails it is also an offense against the laws of the United States. Sometimes, moreover, a single act may involve two offenses in the same jurisdiction, as, for example, driving a car at an excessive speed and driving while intoxicated. In such cases an acquittal on one charge is not a bar to trial on the other.

Significance of these limitations.

The insertion of these various limitations in the bill of rights is an indication of the jealousy with which Americans in the closing years of the eighteenth century regarded the fundamental rights of the citizen. They were not satisfied with the national constitution until these provisions had been added to it. They knew from experience in colonial times that legislatures and courts, as well as kings and governors, could become arbitrary and tyrannical. They desired to make certain that the citizen should have a square deal when brought to the bar of justice. Perhaps they went

[1] The archaic expression "life or limb" is now interpreted as "life or liberty."

too far. They gave the offender more constitutional rights and privileges than he gets in any other country.

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See also the references at the close of the next chapter.

CHAPTER XXX

THE SUPREME COURT AND THE OTHER FEDERAL COURTS

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been so frequently misunderstood as the duties assigned to the Supreme Court and the functions which it discharges as the ark of the constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.—*Lord Bryce.*

The basis of judicial organization.

The constitution, as has been said, did not establish federal courts but merely provided for their establishment by Congress. And Congress lost no time in fulfilling this duty by enacting the judiciary act of 1789, a statute which, with its numerous amendments, still forms the basis of the federal hierarchy of courts. It provided for district courts, circuit courts, and a Supreme Court. There were thirteen district courts at the outset; now there are eighty-four.[1] There were three circuit courts; today there are ten circuit courts of appeal.[2] The Supreme Court, as originally set up, had six justices; this number has now been increased to nine.

The Supreme Court: how constituted.

The chief justice of the United States and the eight associate justices of the Supreme Court are appointed by the President with the consent of the Senate to hold office during good behavior and cannot be removed except by impeachment. The court meets in its new and stately building at Washington and its sessions last from autumn until the beginning of summer. It has its own court officials and makes its own rules of procedure. With the exception of two classes of controversies, namely, those involving ambassadors or other public ministers, and those to which a state is a party, all matters heard by the Supreme Court come to it from lower federal courts or from state courts. In the two instances mentioned the Supreme Court has original jurisdiction.[3]

Its original and appellate jurisdiction.

[1] This does not include four such courts in Alaska, Hawaii, Puerto Rico, and the Canal Zone.

[2] From 1891 to 1911 there were both circuit courts and circuit courts of appeal. In the latter year the circuit courts were abolished.

[3] Congress has provided by statute that this original jurisdiction shall be *ex-*

How its business is done.

During its sessions the Supreme Court meets every week day except Saturday. It convenes at noon and sits (with a short recess) until about four-thirty. These daily sittings are mainly devoted to hearing the oral arguments of attorneys, who also file printed briefs for the justices to study. Each oral argument is ordinarily limited to one hour and interruptions from the bench in the form of questions are not uncommon. On Saturday of each week the justices confer in their own private room upon the cases which have been argued. The various points presented to them in the oral arguments and in the printed briefs are discussed, and a decision is reached by majority vote.[1] The chief justice then designates one of his associates to write the court's opinion in full, although sometimes he assigns the task to himself.[2] When this has been prepared there is a further discussion, with such changes in the wording as may be decided upon, and the document is then handed down to be printed as the decision of the court. Any justice who does not agree with it may write a dissenting opinion, or a minority of the justices may join in submitting a dissenting opinion. If a justice agrees with the decision of the majority, but does not agree with the reasons which they give for it, he may write a "concurring opinion." These decisions and opinions are printed in a series of Supreme Court *Reports*, which fill two or three volumes each year.[3]

How cases may come before it: 1. By original suit.

Cases may be brought before the Supreme Court in either of two ways, by original suit or by appeal. The original jurisdiction of the highest tribunal is limited to two classes of controversies (see *above*) which rarely arise, so that original suits are very few.

2. By appeal.

Hence most cases come before the Supreme Court by appeal either from a state court or from a subordinate federal tribunal. The usual process of appeal is by writ of error. A writ of error is a formal order by which a superior tribunal instructs a subordinate

clusive only in cases *against* ambassadors, etc., and only in cases where, if a state is one of the parties to the suit, the other party is the United States, or another state, or a foreign state.

[1] At least six justices must be present during the hearing of every case. If the court is evenly divided (say four against four, with one justice absent) it is customary to order a rehearing.

[2] This was done in the case of the Gold Clause decision (1935).

[3] The official reports of the Supreme Court were published each year prior to 1874 under the name of the official reporter; since that date they have appeared as successive volumes of *United States Reports*, the first volume being numbered as volume 91. The names of these court reporters were as follows: Dallas (1790–1800); Cranch (1801–1815); Wheaton (1816–1827); Peters (1828–1843); Howard (1843–1860); Black (1861–1862); Wallace (1863–1874). Hence the manner of citing Supreme Court decisions as 2 Dall. 191, or 7 Wheat. 64, or 230 U. S. 105, for example.

court to transmit to it the record of any case which has been decided in the court below. The suitor who secures such a writ is then called "the plaintiff in error" and his opponent becomes "the defendant in error" no matter what their respective positions may have been originally.

Not all cases may be appealed.

The popular notion that anyone who is not satisfied with the decision of the highest tribunal of his own state may carry his case before the United States Supreme Court is far from being in accord with the facts. No litigant has a *right* to appeal from state to federal jurisdiction except where the highest state court (a) has held valid some state law which is alleged to be in violation of the federal constitution, or of a law made by Congress, or of a treaty made by the United States, or (b) has held invalid a federal law or treaty. But since 1914 the Supreme Court has been given discretionary power to review the decision of a state court, if it sees fit, even if this decision has held a state law invalid on a question of federal right. Sometimes it consents to review such decisions; more often it declines.

And appeals go from the highest state court to the Supreme Court of the United States.

At any rate most controversies which begin in the state courts end there. If, however, a case has been decided by the highest state court, and an appeal is permitted, this appeal always goes directly to the Supreme Court of the United States. No subordinate federal court has any authority to hear and determine an appeal from the highest court of a state on any matter. A large part of the Supreme Court's work has nothing to do with the state courts. It mainly is concerned with the hearing of appeals which come up to it from the lower federal courts.

Only actual controversies, moreover, are decided.

Be it borne in mind, however, that nothing comes before the Supreme Court except as the result of an actual controversy. The court does not concern itself with hypothetical questions. It does not prepare "advisory" opinions for the guidance of public officials as some of the supreme courts do in the individual states. In 1793 Washington submitted to the federal Supreme Court a series of twenty-nine questions concerning a proposed treaty, but the justices respectfully declined to answer. Nor will the court pass judgment upon political questions. The constitution, for example, guarantees to every state a "republican form of government." But whether an existing government can be called republican in form is a political question, the decision of which rests with the President and Congress, not with the Supreme Court.

Landmarks in the Supreme Court's history.

The Supreme Court of the United States began its work in 1790 with John Jay as its first chief justice. He had with him five associate justices, more than were really needed to handle the small amount of business which came before the court. At its first meeting no cases appeared; the court appointed a clerk and then adjourned for lack of anything else to do. During the initial ten years of its history the court decided only six cases involving questions of constitutional law, and when John Marshall became chief justice in 1801 there were only ten cases awaiting him on the docket. Thus far the court had not exercised any great influence on the nation's political development. Its most important decision upon a constitutional question, moreover, had created a storm of protest and had been set aside by the action of the states in adopting the eleventh amendment.[1] The prestige of the court was relatively small, and a position upon its bench during these early years was regarded as less attractive than the post of a governor or senator. Chief Justice Jay, for example, resigned from the Supreme Court in 1795 to serve as governor of New York.

Its chief justices.

John Marshall.

During the next few years the position of chief justice was bandied about somewhat; but in 1801 John Marshall was given the reins and he held them firmly for more than three decades.[2] Born in Virginia, he saw service as a captain in the Revolutionary army when only twenty-one years of age. While still a young man he studied law and entered politics, like so many other young Southerners of his day. Although not one of those who framed the federal constitution, Marshall was a member of the Virginia convention which ratified it in 1788, and was on intimate terms with some of those who had a hand in its making. He declined the post of attorney-general in Washington's cabinet, but was elected to Congress and later became secretary of state under John Adams. Marshall was appointed chief justice in the outgoing days of this administration, only a few weeks before the inauguration of Jefferson.

[1] Chisholm *v.* Georgia (1793). See pp. 512–513.

[2] On Jay's resignation John Rutledge was named chief justice and assumed the office, but was not confirmed. Then the post was offered to William Cushing, who was already an associate justice, but he declined it. Oliver Ellsworth was then (1796) appointed and confirmed. He resigned in 1800. Then came John Marshall (1801–1834) and Roger B. Taney (1836–1864), followed by Salmon P. Chase (1864–1873), Morrison R. Waite (1874–1888), Melville W. Fuller (1889–1910), Edward D. White (1910–1921), William H. Taft (1921–1930), and Charles Evans Hughes (1930–).

His constitutional views and influence.

This great chief justice was a Federalist in the original sense of the term, a believer in a strong central government, and he lost no opportunity of making his influence felt in that direction. When he took office the powers of the national government under the constitution were not sharply defined; scarcely a clause of the constitution had been subjected to judicial interpretation. To the work of making it "efficient," however, Marshall and his associates promptly set their hands. A succession of great decisions during the next thirty years not only cleared the constitutional horizon but enormously strengthened the lawmaking arm of the national government and incidentally raised the court to a position of great authority.[1]

The man and his work.

John Marshall was not only a great jurist but a great statesman, and he had the advantage of a clean slate to write upon. There was as yet no long train of decisions to hamper the court's freedom, no doctrine of *stare decisis*, for there were no decisions to let stand. On the other hand his task was one of great difficulty, for the period through which he guided the Supreme Court was critical in many ways. The issues which came up for adjudication were drawn from the shambles of partisan warfare, and the court on more than one occasion had to take a stand which aroused strong political resentment. State officials everywhere looked with suspicion upon what seemed to be a steady encroachment upon state powers. During his thirty-four years of service Marshall wrote the decisions of the court upon no fewer than thirty-six questions of constitutional law.[2]

His principles of constitutional construction.

Two principles of constitutional construction Marshall enunciated and maintained. In the first place he insisted that every power claimed by Congress must be articulated to some provision of the constitution, the onus of finding an express or implied grant of power being imposed upon the federal authorities. But, in the second place (and here is where he made his great contribution), Marshall held that any grant of power, when once found, should be interpreted liberally, giving to Congress all reasonable discretion as to how the authority should be exercised.

[1] For an exhaustive account see Albert J. Beveridge, *Life of John Marshall* (4 vols., Boston, 1916–1919).

[2] These include such great landmarks as Marbury *v.* Madison, McCulloch *v.* Maryland, Gibbons *v.* Ogden, and the Dartmouth College Case. For a brief review of these decisions see William B. Munro, *The Makers of the Unwritten Constitution* (New York, 1930), pp. 53–84.

Lord Bryce's estimate.

"No other man," says Lord Bryce, "did half so much either to develop the constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land; no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him have continued in general to guide the action and elevate the sentiments of their successors." [1]

The court's power to declare laws unconstitutional.

It was under Marshall's leadership that the court first undertook to assert its place as the guardian of the constitution, with authority to invalidate any law, whether state or federal, which contravened the provisions of this instrument. By so doing the court assumed a power which was not expressly given to it by the constitution, a power which even at the present day is believed by some to have been a usurpation. Whether the court's action was unjustified is a much-involved question, and whole books have been written about it.[2] There is no good reason why even a brief summary of the arguments on either side should be recapitulated here, for the essential facts have been given in a previous chapter.[3] But whether a right or a usurpation in its origin, the judicial supremacy of the Supreme Court over the laws of Congress and the laws of the state, insofar as they conflict with the national constitution, is now a fact, an indisputable fact, a fact that everybody recognizes. It is no longer worth arguing about.

Marshall's successor: Roger B. Taney.

The foundations of the Supreme Court's power were firmly laid in Marshall's time. Marshall died in 1835. His successor, Roger B. Taney of Maryland, was a man of different stripe, a disciple of Andrew Jackson, and a stanch exponent of the states' rights doctrine. Under Taney's guidance there was a reaction against the centralizing of powers in the federal government. Taney's most notable decision was delivered in the Dred Scott Case (1857). In this instance the court applied rules of strict construction to the powers of Congress, even within the territories, by holding that Congress had no right to prohibit any citizen from owning slaves in such areas. "No word can be found in the constitution," said

[1] *The American Commonwealth*, Vol. I, p. 268.

[2] See the references at the close of this chapter.

[3] *Above*, Chapter V.

Taney, "which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description." In some of its other decisions during the early years of the Civil War, moreover, the court seemed to be placing obstacles in the way of a full exercise of the national government's powers.

The court and the new order.

With the older issues of slavery and states' rights out of the way, however, the work of the Supreme Court during the past sixty-five years has been mainly concerned with the solution of economico-legal problems, that is, with legal issues which are closely related to questions of industry, trade, and social welfare. Its great decisions during these six decades have had to do with the regulation of corporate business, with taxation, with labor questions, and with the expansion of governmental activities into the realm of business. These are matters in which large numbers of people have a direct pecuniary interest and when an interest of that sort is adversely affected there is bound to be an uproar. It is not surprising, therefore, that some of the court's decisions on the validity of economic and social legislation have been unpopular with the liberals. Notable among those were the court's rulings in the Income Tax Case (1894), the Child Labor Tax Case (1922), the Schechter Case (1935) and the Hoosac Mills Case (1936). On the other hand some of its decisions have been equally unpopular with the conservatives, as for example in the Chain Store Tax Case (1931) and the Gold Clause Cases (1935).[1]

The Power of Judicial Review

1. The power is beyond dispute.

In summary, then, four actualities of American judicial administration are now about as well established as it is possible for anything in the practice of government to be. In the first place the Supreme Court of the United States has made good its power to declare laws unconstitutional. Congress, the state legislatures, and the country have accepted this *fait accompli* for more than one hundred years. Some may dislike it, but they do not deny its existence. They admit its existence, in fact, by their proposals to amend the constitution so as to take this power away.

[1] These cases are officially known as Pollock *v.* Farmers' Loan and Trust Co., 158 U. S. 601, Bailey *v.* Drexel Furniture Co., 259 U. S. 20, Schechter Poultry Corporation *v.* United States, U. S. Sup. Ct. Law Ed. Advance Opinions, 1934–1935, Vol. 79, p. 888, U. S. *v.* Butler et al., *ibid.*, Vol. 80, pp. 287–306. Tax Commissioners of Indiana *v.* Jackson, 283 U. S. 527, and The Gold Clause Cases viz.: Norman *v.* B. & O. R. R., Nortz *v.* U. S., and Perry *v.* U. S., 294 U. S., 240, 317, 330.

2. Its exercise has proved beneficial.

Second, the action of the court in thus asserting the doctrine of judicial supremacy has proved, on the whole, beneficial in its results. Had the court assumed a different attitude the American constitutional system would have become a hydra-headed monstrosity of forty-eight rival sovereign entities. It could never have gained that strength and regularity of operation which it possesses today. In order to enforce a separation of powers between the executive and legislative arms of the government, and a division of powers between the state and the nation, there must be an arbiter to reconcile conflicts of jurisdiction. In order to protect individual liberty there must be an arbiter between the governing powers and the governed. The provisions of a constitution are never so clear as to preclude all chance of dispute. There must be some authority with final power to interpret them. Accordingly, the constitutional powers of the courts, as Woodrow Wilson once said, "constitute the ultimate safeguard of individual privilege and of governmental prerogative." [1] The judiciary is the balance-wheel of the whole system.

3. It is almost a unique power.

Third, the power now exercised by the Supreme Court of the United States is one which has been rarely exercised by the other high tribunals of the world. Until very recent years no court in any other land has openly ventured to nullify laws enacted by the highest legislative authorities. During the past quarter of a century, however, there have been some such decisions in a few South American countries, but no court in Great Britain or France has ever declared a national law unconstitutional nor has it the power to do so. That being the case, why is it essential or even desirable that the Supreme Court of the United States should possess this right of judicial review? The answer is threefold: first, the governments of these countries are not based upon the principle of separating legislative and executive power. The executive in Great Britain and in France is responsible to the legislature. In the event of any difference between the two, the will of the legislature prevails. Second, these foreign constitutions contain no specific enumeration of constitutional privileges which are guaranteed to the citizen, hence there are no civic rights which the legislature is not entitled to invade if it sees fit. Finally, there are no state governments in Great Britain or in France and hence no division of powers between states and nation. No conflicts of jurisdiction on that score can

[1] *Constitutional Government in the United States* (New York, 1911), p. 142.

arise. In a word the need for a judicial arbiter is vastly greater in the United States than in the two European countries with which comparisons are commonly made.

4. It fits the national psychology.

Finally, while the authority exercised by the Supreme Court of the United States is without counterpart in these European countries, it seems to fit the American temperament. For it simply means that Americans have adopted the practice of submitting to an impartial tribunal, made up of eminent jurists, all great questions of governmental jurisdiction which are liable to excite the political passions of the people. If the rulings of the Supreme Court are not always agreeable to the popular sentiments of the day it is because neither judicial nor public opinion is infallible. The doctrine set forth by Jefferson in the Virginia and Kentucky resolutions that "as in all other cases of compact among parties having no common judge, each party (presumably each state) has an equal right to judge for itself" would have utterly disintegrated the nation. The Supreme Court, when all is said, represents as near an approach to a strictly non-partisan body as the makers of any government have been able to devise.

The court and public confidence.

One reason why the Supreme Court has managed to retain a large measure of public confidence despite many unpopular decisions can be found in its refusal to decide political questions. It has always taken the attitude that questions of expediency must be left to the discretion of Congress. For example, it has held that Congress and the President, not the judiciary, must decide which of two rival governments within the same state ought to have recognition.[1] In another case it declined to render an opinion as to the lawful duration of military occupation in Cuba, holding this to be "the function of the political branch of the government." [2]

Individual members of the Supreme Court, moreover, have scrupulously avoided political entanglements. The justices, from the moment they ascend the bench, cease to be Democrats or Republicans and cut themselves off from even the most distant connection with party politics. Not only that, but they abstain from any business connection, however remote, which might tend to impair their impartiality. When a justice is appointed to the Supreme Court he even changes his investments (if he has any) into non-commercial securities so that he may not have the color of self-interest. People may question the advisability of allowing any

[1] Luther *v.* Borden, 7 Howard, 1.

[2] Neely *v.* Henkel, 180 U. S. 109.

nine men to exercise the great powers which the Supreme Court now possesses, but there are few who ever question the competence or integrity of the justices.

Popular errors concerning the work of the Supreme Court:

Nevertheless there have been various proposals to limit the powers of the Supreme Court, especially in the matter of declaring laws unconstitutional. There is a common impression that the court invalidates a great many acts of Congress (one of them every few days), but in the whole history of the Supreme Court, covering nearly one hundred and fifty years, it has held fewer than sixty federal laws unconstitutional. Congress passes many hundreds of laws at every session, hence the percentage of measures which the court invalidates is so small as to be almost negligible.

1. Number of federal laws held unconstitutional.

2. "Five to four" decisions.

There is also a common impression that the Supreme Court usually rejects a federal law by a five to four vote—five justices holding the law unconstitutional while four dissenters declare it to be valid. In this way, it is said, a single justice who holds his office for life and is not responsible to the voters may set aside the action of Congress and the President, both of whom are the people's representatives. Critics of the court like to harp on this "one-man tyranny" as an undemocratic arrangement which ought to be terminated without delay.

What are the facts?

Two things can be said in reply to this contention. In the first place very few laws of Congress have been declared unconstitutional by a close vote of the justices. There have been only ten or twelve such cases in the whole history of the court, and of these only three or four were of any substantial importance. In the second place no statute of Congress has ever been declared unconstitutional by the action of a single judge. No "one-man decision" has ever been made by the court. To make a majority decision takes one man plus four others. It is true, no doubt, that the decision could not be made without the vote of the fifth judge; but neither could it be made without the votes of the other four.

The "one-man" contention.

And why should the turning of the scale by a single vote be so much more objectionable in the Supreme Court than it is in other branches of the government? In the Senate, when there is a tie, the Vice President (who is not a member of that body) casts the deciding vote. Many important laws have been thus enacted. Were they "one-man laws"? Were they enacted by the vote of a single man? The same is true of the House of Representatives. That body has occasionally passed important legislation by a bare

majority of one; that is, by the casting vote of the Speaker. Is not this also "one-man tyranny"? In 1876–1877 Rutherford B. Hayes was elected President of the United States by a majority of one in the electoral college. Was he a one-man President? Was he chosen President by the vote of a single elector? If so, we should like to know what one man's vote elected him, or could have elected him, without the votes of the other 184 Republican electors.

The same principle goes further. If the polling in a congressional district is so close as to elect a representative to Congress by a bare majority of one, must he then decline to accept the office on the ground that he does not want to be a one-man representative, elected by the vote of a single citizen? No congressman, so elected, would think of doing anything of the sort. On the contrary, he would fight in the courts and in the House for recognition of the fact that election by a majority of one is just as legal, just as valid, as election by a thousand.

Proposals to limit the court's power:

Nevertheless, the one-man argument seems to carry weight with a large number of people and plans for limiting the authority of the court have been brought forward. It has been suggested that a two-thirds vote or even a unanimous vote of the justices ought to be made requisite for declaring a national law unconstitutional. But this would hardly accomplish the end in view. Some one judge would still hold the balance. One judge would determine from time to time whether the necessary two thirds or the necessary unanimity could be had. Fewer laws would be declared unconstitutional perhaps; but close decisions would continue to be given. We require trial juries to be unanimous in criminal cases and surely experience has shown that one juryman, by holding out against the other eleven, can keep a defendant from being acquitted or convicted, thus bringing the whole proceedings to naught. The requirement of unanimity gives to one man just as much power as does the requirement of a majority.

1. A higher requirement of votes in the court.

2. Giving Congress power to override judicial decisions.

Another suggestion is that whenever the Supreme Court declares a law unconstitutional the measure should then be sent back to Congress, where, if reënacted by a two-thirds vote in both Houses, it would become valid in spite of the court's decision. The objection to this plan is that it would make Congress the final judge of its own acts. It would permit Congress to violate the provisions of the constitution whenever two thirds of its members made up their mind to do so. The will of Congress in America, like the will of

parliament in England, would be supreme. Congress would not need to propose any changes in the constitution; it could gain the same end by merely passing an unconstitutional law in the way that it now overrides a presidential veto. The will of a two-thirds majority in Congress would then be the Constitution of the United States. By a two-thirds vote Congress could abolish freedom of speech, freedom of the press, freedom of worship, trial by jury, and any of the other safeguards of individual liberty. By a two-thirds vote it could take private property without compensation, or abolish universal suffrage, or even take away the President's constitutional powers.

The vital questions.

The question is, therefore: Are we ready to accept the judgment of Congress on all questions affecting the relations of the nation to the states, the powers of public officials, and the rights of the individual? Do we regard Congress as a body of such wisdom and fairness as to warrant making its will supreme—not merely over the Supreme Court, but over the constitution also? Do we desire, in effect, to abolish the present Constitution of the United States and to adopt a new constitution, which would consist of only a dozen words, as follows: "The action of Congress by a two-thirds vote shall be the supreme law of the land"?

The public attitude towards decisions from one generation to another.

The student of American history, if he takes the trouble to look into the matter, will find that decisions which are unpopular in one generation are often highly praised by another. Some of the Supreme Court's earlier decisions created a great uproar when they were made, but today are generally commended. When Chief Justice Marshall, more than a hundred years ago, delivered some of his notable decisions he was assailed from almost every quarter. His judgment in the case of McCulloch *v.* Maryland, for example, was so bitterly resented that it brought forth threats of nullification, of secession, and of armed defiance. But the sober sense of the people soon asserted itself and today Marshall is by common consent regarded as the greatest of all American judges. His statue stands in the hall of fame and his biography is spread into four volumes.

Personnel and Philosophy

Some eminent associate justices.

Other jurists of high eminence have also adorned the supreme bench of the United States during the fourteen-and-a-half decades of its history. In the court's earlier years it numbered among its

justices several of the "Fathers" themselves, John Rutledge, James Wilson, Oliver Ellsworth, John Blair, and William Paterson. They interpreted the work that they themselves had done. Later, during the first half of the nineteenth century, Joseph Story served his long term of thirty-four years (1811–1845). Story may rightly be regarded as the classic expounder of the constitution, and his elaborate commentaries on it have not ceased to hold the admiration of legal scholars at the present day.[1] Next to Marshall, moreover, Story had the largest influence in shaping that notable series of decisions which put vitality into the strip of parchment on which the nation was founded. Others whose names stand out conspicuously on the roll of the justices are Roger B. Taney, Salmon P. Chase, Stephen J. Field, John M. Harlan, Horace Gray, William H. Taft, and Oliver Wendell Holmes—all of them notable personalities. The last-named justice gained a unique place on the roll of great American jurists by reason of his extraordinary skill in writing decisions which the ordinary layman could read and enjoy.[2] It is a great art to combine law and logic with good literature.

Joseph Story.

The work of the Supreme Court is far more difficult, and more exacting, than the average citizen imagines. To him it is merely a matter of reading the constitution and telling the people what it means. But the constitution is not merely a set of verbal formulas which, once interpreted, bear that meaning for all time. The meaning of its clauses is not to be understood by taking the words in one hand and a lexicon in the other. Every provision in this document must be construed as a dynamic affair, related to the times and circumstances in which it is applied. As industrial technique and our ways of life change with each generation, the constitutional provisions must be warped into harmony with these altered conditions. If the constitution were a static affair, a series of inflexible provisions set down on paper, it would have been discarded through sheer necessity some years ago. But, as Marshall once said, it is a document that has to be freely adapted "to the various crises in human affairs." [3]

Difficulty of the court's tasks.

[1] *Commentaries on the Constitution of the United States*, in two volumes. There have been many editions.

[2] Alfred Lief (editor), *The Dissenting Opinions of Mr. Justice Holmes* (New York, 1929).

[3] For a further discussion see H. L. McBain, *The Living Constitution* (New York, 1927).

The doctrine of *stare decisis.*

This does not mean, of course, that changes of interpretation of constitutional provisions are made lightly, or in obedience to judicial caprice. When the Supreme Court has once made a ruling of law, this ruling becomes a precedent and will be generally adhered to in future cases of the same nature. This is known as the principle of *stare decisis*—stand by the decision. The burden of proof is on those who ask that the rule be changed. And were it not for this principle no lawyer could advise anyone with a reasonable assurance of being right. So the Supreme Court does not often reverse its stand; nevertheless there have been some notable instances of such reversal. For example, it decided in 1880 that an income tax might be levied by Congress without apportionment among the states, and fourteen years later it ruled that such taxes must be apportioned.[1] On another occasion the court decided that Congress could not constitutionally enact a law making paper money a legal tender in payment of debts which had been incurred before the passage of such legislation.[2] A year later, with changes in the personnel of the court, it upset this decision and held that Congress did have power to pass such legislation.[3]

Reversal by the differentiation of cases.

More commonly, however, the court finds it possible to modify a prior decision by some means other than a frank reversal. No two cases are exactly alike when they come up for trial; hence a later case can be differentiated from an earlier one and a different ruling made. Thus the court once held that Congress could impose a prohibitive tax on oleomargarine when shipped in interstate commerce; then, some years later, it ruled that a similar tax could not be imposed by Congress on the profits of the products of child labor shipped from one state to another.[4]

Inadvisability of following precedents too strictly.

This right to change its attitude, either openly or by indirection, is one of the things which enables the Supreme Court to keep the constitution endowed with resiliency. In matters strictly affecting rights of life, liberty, and property it is obviously essential that the interpretation of the law shall not be subject to frequent and capricious changes. Otherwise all individual rights, contracts, and business relations would be clouded by uncertainty. But where issues of public policy are concerned the

[1] See *above*, pp. 358–359.
[2] Hepburn *v.* Griswold, 8 Wallace, 603 (1869).
[3] Knox *v.* Lee, 12 Wallace, 457 (1870).
[4] For the court's reasoning in differentiating between these two cases see *above*, pp. 412–413.

rigid application of *stare decisis* would slow up the machinery of social progress. In court decisions, as in all other expressions of human judgment, a reverence for the past may be carried too far. It is the function of the judiciary to facilitate social progress, but in an orderly way. A court should not reverse its own decisions, therefore, until it is satisfied that greater justice than injustice will be done by such action.

A barrier to social progress?

The Supreme Court of the United States has sometimes been criticized as a barrier to new deals and other programs of social reorganization. Such criticism, if there are any grounds for it, should not be directed against the court but against the constitution, and more especially against the various guarantees of civil liberty which it contains. If we were to delete from the constitution the various provisions which reserve certain powers to the states, as well as those which guarantee every citizen due process of law, the equal protection of the laws, just compensation when private property is taken for public use, security against the impairment of contracts, and so on—then it would be easy for the court to give both Congress and the state legislatures a vastly greater latitude in revamping the existing order of things. But many people want these safeguards retained for their own protection while grumbling loudly when the court uses them to protect somebody else.

Are advisory opinions desirable?

It has been mentioned that the Supreme Court of the United States, unlike the supreme courts in some of the states, does not render advisory judicial opinions. In many ways this self-imposed restriction has been unfortunate. It means that, in many cases, the court does not render a decision on the constitutionality of a law for a year, or even a couple of years, after it has been passed. Then there are omelets to be unscrambled. It has been suggested that Congress might provide, by an amendment to the judiciary act, for the rendering of advisory judicial opinions by the Supreme Court whenever requested by the President or by resolution of the national legislature. In such cases the court could point out unconstitutional features in pending legislation and have them removed before enactment. Such an arrangement has proved highly advantageous in state government.

The Lower Federal Courts

Next below the Supreme Court comes the circuit court of appeals. The territory of the United States is divided into ten cir-

The circuit court of appeals.

cuits, each circuit containing several adjacent states. There is a circuit court of appeals for each of these ten circuits, such courts having from two to six judges, but two judges are always required as a quorum for the hearing of cases.[1] The circuit court of appeals in each circuit holds sessions at various cities, hearing appeals from the district courts as well as from the rulings of administrative bodies such as the federal trade commission. These circuit courts of appeal have no original jurisdiction, that is, they hear no cases in the first instance. In many cases, where no issue relating to the constitutionality of a law is raised, the circuit court of appeals has final authority. Thus they serve to stem the flow of appeals which would otherwise clog the docket of the supreme tribunal at Washington. But when a circuit court of appeals declares a state law unconstitutional, an appeal may be carried to the Supreme Court of the United States. In other cases the right of appeal depends upon the willingness of the Supreme Court to review the issue. This it ordinarily does where the case raises significant questions involving the federal constitution or laws.

The federal district court.

Then come the federal district courts. The entire territory of the United States is divided into eighty-four districts. Each state constitutes at least one district while the more populous states have two, three, or even eight within their boundaries. In a few cases a district is made up by taking portions of two or more states. When there is more than one judge in a district, each holds court simultaneously; they do not sit together. This expedites the handling of business. Judges can also be shifted temporarily from one district to another whenever such action becomes desirable through pressure of litigation.

Its officers.

A federal district court holds two or more sessions each year, sometimes sitting at various places within the district. It is a court of first instance, and the only federal court in which a jury is used. Every district also has its United States attorney and United States marshal, appointed by the President with the concurrence of the Senate. The function of the district attorney is to act as the representative of the nation in prosecutions before the court. The marshal executes the court's orders and judgments, attends to the service of its writs, and is its general executive officer. Both are under the direction of the federal department of

[1] In case of a tie the issue may be certified to the Supreme Court for decision or instructions.

justice. Each district court also has a federal commissioner who conducts the preliminary hearing in criminal cases and decides whether an accused shall be held for the grand jury.

The court of claims.

A word should be said about certain special courts which have been established by action of Congress but do not form part of the regular federal judiciary. In other words the constitutional provisions (as to appointment, life tenure, and so forth) which cover all the federal courts do not extend to these special tribunals. First among them is the court of claims which consists of a chief justice and four associate judges appointed by the President. It has been established because no one possesses the right to sue the United States without its consent. As it did not seem wise to give such consent to suits in the regular courts this special court was created to hear and determine the merits of certain claims against the federal government, particularly those arising out of contracts. In certain cases there is a right of appeal to the Supreme Court. When the decision is against the government an appropriation for the amount of the award is made by Congress as a matter of course. It should not be understood, however, that the court of claims has authority to entertain all suits against the United States. It has only such jurisdiction as Congress gives to it. In 1935 Congress took away from it the power to hear claims for the recovery of processing taxes unless such suits were filed within a given time.

The court of customs and patent appeals.

Then there is a customs court (in reality it is a board of appraisers) which makes rulings on controversies as to valuations and duties arising under the tariff. It has nine judges. The court of customs appeal, with five judges, has power to review the rulings of this lower court, and its decisions, in turn, are subject to review by the Supreme Court, but only in exceptional cases. Somewhat strangely the court of customs appeal is also given the right to hear appeals from decisions made by the patent office.

The courts of the District of Columbia, Hawaii, Alaska, and Puerto Rico, are commonly known as federal courts but they are not established under the judiciary article of the constitution. Authority for their creation is derived from the constitutional provisions which give Congress complete jurisdiction over territories and the national capital. Hence the judges and other officers of the territorial courts can be appointed for fixed terms, and not necessarily for life tenure as are the regular federal judges. Like-

wise their jurisdiction is determined by the discretion of Congress. The courts of the Philippines are no longer within American jurisdiction, but appeals from their decisions may still be carried, in some instances, to the Supreme Court of the United States. Mention should also be made of the consular courts which by treaty have been set up for the trial of cases involving American citizens in certain countries such as Turkey, Abyssinia, Persia, and China. In China there is also a United States court which hears appeals from the consular courts in that country.

Protections for the independence of the federal courts.

In the federal courts (except those just mentioned) the judges are appointed for life or during good behavior. They are removable only by impeachment before the Senate of the United States. Their salaries may not be diminished during their tenure of office. The rule covering these matters cannot be paraphrased into any clearer or more concise language than that of the constitution itself:

> "The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

But this does not mean that Congress has no control over the courts. It can reorganize, or even abolish, any of the federal courts except the Supreme Court. Even in the case of the Supreme Court it could increase the number of justices and thus change the character of the court. Congress could not reduce the existing number of justices but it would be allowable to provide that vacancies shall be left unfilled until a desired reduction is accomplished. Moreover, it can alter the power of the Supreme Court to hear appeals, for the constitution provides that the Supreme Court "shall have appellate jurisdiction . . . with such exceptions and under such regulations as Congress shall make." [1] Finally, there is no way in which the judges in any federal court can get their salaries except by way of a congressional appropriation and no court can mandamus Congress into making an appropriation for this or any other purpose. The federal courts are not independent in the sense that the people, through their representatives, have no control over them.

Thirty-five years ago I was listening to the discussion of an

[1] Article III, Section 2, paragraph 2.

adjudicated case in a law school classroom. The decision in this particular instance appeared to have been in accord with the plain intent of the law, but obviously unjust to one of the suitors. "That may be good law," suggested one of the students, "but it isn't justice!" "Quite true," replied the professor, "but if it's *justice* you want to study, go over to the divinity school; it's *law* we're studying here." This reply amused the class, of course; but the student was merely making the sort of comment that most laymen would have made under the circumstances. We speak of our courts as courts of justice, and it is justice that the average layman expects them to administer. He forgets that what judges are sworn to administer is *the law*.

Law and justice.

Yet the purpose of the law is to establish justice. Its design is to ensure every man a square deal. Of course the law does not always succeed in achieving this end for it is the product of human activity and as such is subject to human frailties. A self-evident proposition it is, or ought to be, that when the provisions of a law are clearly unjust, no judge can wring justice out of them without violating his oath to administer the law without fear, favor, or affection. He may interpret the written words broadly or narrowly, thus providing some leeway in the interest of justice, but he cannot disregard the obvious intent of constitutions or statutes. Many of the "unjust decisions" which arouse the ire of people from time to time should therefore be blamed upon the lawmakers and ultimately on the voters who choose these lawmakers. The people send inexperienced and dull-witted men to represent them in Congress, or in the state legislatures; these representatives enact some ill-advised law; the judges then apply its plainly written provisions; and the result is an indignant outcry against the autocracy of the courts. What are judges for, the unthinking ask, if not to administer *justice?* The answer is that to have judges administer what they believe to be justice, even in disregard of constitutions and laws, would be the very essence of autocracy. There would be no surer way to abolish a government of laws and substitute a government of men.

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CHAPTER XXXI

THE AMERICAN PHILOSOPHY OF GOVERNMENT

Nothing appears more surprising, to those who consider human affairs with a philosophical eye, than the ease with which the many are governed by the few.—*David Hume.*

Hero worship is strongest where there is least regard for human freedom.—*Herbert Spencer.*

First in importance come the facts of government.

The study of American government must be primarily concerned with facts; because the true character of a government is determined by its practices rather than by its philosophy. Accordingly, this book has devoted most of its pages to the task of setting forth the actualities of the American political system. As in every other scientific exploration the study of government should begin by laying hold of the visible phenomena. With these in hand it should proceed to the uncovering of facts which are not so plainly in sight. An acquaintance with the realities should thus precede, rather than follow, any discussion of the philosophy on which American government is assumed to be based. The design can be better understood after a careful inspection of the structure.

Then the philosophy.

Yet the design of a government, in other words the philosophy underlying it, is by no means unimportant. It exerts a continuous and considerable influence upon the workings of the political mechanism. And political theories, or points of view, have unquestionably had a large part in directing the evolution of American government. They have been in the back of men's minds during every discussion of governmental organization and methods. The American citizen has a philosophy of government, and it gives a very definite cast to his political thought although its principles are not always clear in his own mind. To the extent that the citizen gets hold of them, however, they become mental stereotypes and influence his attitude on all questions of public policy. These principles, when taken together, make up a creed to which the citizen gives a more or less consistent allegiance, in spite of his realization that some of its tenets no longer fit the times or the circumstances.

Fundamentalism in politics.

In other words the thought of the people is heavily colored by a political fundamentalism. Certain formulas of free government are accepted as gospel by the great majority of Americans without much regard to their rationality. If you have any doubts on this score, just propose some new governmental device such as the single-chamber state legislature or the establishment of an intelligence test for voters. In the great majority of instances your proposal will not be listened to and discussed on its merits. It will be met with the retort that such a thing would be un-American and hence undemocratic. That is to say, it clashes with something in the set of dogmas which make up the creed or philosophy of the average American. What are these principles? Sixteen of them will be enumerated, but this does not exhaust the entire list.

The chief principles in the American philosophy of government:

1. A republican form of government.

First among the various principles of the American political philosophy is a settled belief in the superiority of the republican form of government. On this point there is virtual unanimity among the American people. In most European republics one can find a group of people, sometimes a numerous and influential group, which desires to change the government from a republic to a monarchy. There is still a royalist faction in France despite the fact that the Third French Republic has passed its sixty-fifth birthday. The cause of imperial restoration likewise has a strong following in Austria and in Hungary. But in the United States there has been no royalist party since the federal constitution went into effect. The country is virtually a unit in its allegiance to the republican ideal.

What this expression means.

But what does the average American understand by a republican form of government? The essentials, as he understands them, are a chief executive chosen by the people, either directly or through their representatives, and an elective lawmaking body. Most Americans do not look upon any government as republican in form unless the people elect and control both branches of it, executive and legislative. Where the legislature is composed of two branches, moreover, the popular control must extend to both branches. An hereditary chamber, even though it be secondary to the elective branch of the national legislature, is regarded by Americans as unrepublican.

Its identification with democracy.

Consequently the average American mind identifies a republican form of government with democracy. A monarchy, no matter what its character or limitations, seems difficult to reconcile with

popular or democratic government in the New World mentality. France is a republic, with a president chosen for a limited term and with a national legislature of two elective chambers. That is enough to give France the place which she occupies in the public imagination as a democratic republic, or a sister republic to the United States, as the newspapers often express it.

Nevertheless Great Britain, although a monarchy, has a closer affinity with American republicanism than has France or any other country of continental Europe. To overlook that fact is to let ourselves pass into the bondage of terminology. It is a way of demonstrating how words have the power to muddle thought. The old-time classification of governments into monarchies and republics can perform little service nowadays except to mislead, because everyone knows that a government may be republican in form without giving the masses of people any substantial measure of control over it. That has been repeatedly demonstrated in some of the republics of Central and South America, as well as in Germany, Poland, Russia, Liberia, China, and divers other countries which call themselves republics. On the other hand a titular monarchy may be thoroughly republican in all the true essentials of popular participation in government, as is the case with the various dominions of the British Commonwealth. The vital distinction is not between republics and monarchies but between governments which conform to the democratic principle and those which do not.

2. A representative democracy.

Conformance with the democratic principle requires that the popular will shall be made manifest by the action of all those who are politically competent. To put this in simpler form it means government under the "control of the people," not the whole people, but of those who ought to have the right to vote. Democracy is thus, to some extent, a matter of degree, or of opinion. It raises the question of political competence. Twenty years ago the United States was regarded as a democracy although women were excluded from the electorate in most of the states. Americans look upon the French Republic as a democracy although women are still excluded from voting privileges there. A government is deemed to be democratic whenever its electoral basis is sufficiently broad to permit at each election a fair portrayal of the general will. Democracy may be either representative, or direct, or it may be a combination of both. The American national democracy

is representative. It functions wholly through elective and appointive officials. State and city governments in the United States are also representative for the most part, but in some cases they make provision for direct action on the part of the electorate by means of the initiative, referendum, and recall. To that extent they are direct, as well as representative democracies.

3. Written constitutions as the basis of government.

Government rests upon the consent of the governed. That proposition embodies an important article in the American political creed. The consent of the governed is attested by a written constitution which forms the basis of government. The purpose of a constitution is threefold: to set up a government, to endow it with powers, and to circumscribe it with limitations. A constitution determines what the governed have consented to let their government do. Hence both the national and the state constitutions of the United States guarantee the citizen certain fundamental rights and protect him against the abuse of political power. It is a consensus of opinion among Americans that such written guarantees are desirable, and even essential, to prevent the oppression of the few by the many, in other words to preclude despotic action in individual cases under the guise of majority rule. The idea is that the people shall first agree with due deliberation upon the fundamentals, irrespective of specific cases, and that, so long as these agreements are in effect, such fundamentals of government must be respected by those to whom the people have delegated authority.

4. Popular sovereignty.

Since a constitution is the supreme law it follows that legal sovereignty is synonymous with the power to make and unmake the constitution. The legal sovereign is that authority which can enforce its will to the exclusion of all other wills. Offhand it is frequently said that sovereignty in the United States "rests with the people." This statement, while broadly accurate, is not sufficiently informative. Legal sovereignty, in the United States, is not vested in the hands of the people directly. The people, by majority vote, cannot change the national constitution. Changes must be made through the elective representatives of the people in one of the four ways which the constitution prescribes.

In the parlance of a constitutional lawyer, therefore, it is quite correct to say that there are no limits on the powers which may be exercised by a two-thirds majority in both Houses of Congress and a majority in both chambers of thirty-six state legislatures when they act in concurrence. But the action of Congress and of

the state legislatures in thus amending the supreme law of the land is merely expressive of the popular will. These bodies are simply the agencies through which the will of the people is promulgated. Sovereignty does not therefore reside with them; it rests with the power which stands behind them and provides the momentum. Popular sovereignty does not cease to be real because it must function through designated channels.

Limitations upon it.

Yet there are limitations upon the sovereignty of the people. The form and spirit of a government are not entirely matters of human plan and program, subject to no forces which are beyond the power of the electorate to control. Man's unfettered will is not the sole determinant of political institutions. There must be laws which govern it, for all nature is governed by law. Everything in nature inclines to move in seasons, or in undulations, or in cycles. Light, heat, and sound come to us in waves; seed-time and harvest, rainfall and drought come and pass with the seasons; while prosperity and depression, conservatism and radicalism, courage and caution, follow each other with cyclic regularity. Surely there must be forces affecting and controlling the popular will in a universe which is everywhere else controlled!

Political determinism.

"Before the sea of human opinion, as on the shore of the ocean," wrote Sainte-Beuve, "I admire the ebb and flow. Who shall discover its law?" We speak of the omnipotence of the popular will for the mere reason that no one has as yet discovered the laws which mould and control its course. Everyone knows, however, that geographic and cultural conditions have been influential factors in determining the course of political evolution in the past. Everyone also knows, or ought to know, that eras of economic depression have a profound influence in moulding the character of governments by forcing them to assume powers which the people would not have permitted them to acquire in normal times. And having once possessed themselves of emergency jurisdiction, all governments strive to retain it permanently.

Systems of government, therefore, do not ultimately depend for their success or failure upon human shrewdness and good planning alone but upon a great many factors among which are geographic good fortune, racial qualities, and the luck of being able to keep out of war. We say that people choose their form of government. More often, however, the choice is determined for them by circumstances over which they have no control. They do not choose,

for example, between a written or an unwritten constitution. If an unwritten constitution has not been handed down to them from the ages, as in England, they have no alternative but to provide themselves with the other kind. So what we call popular sovereignty reduces itself in many instances to the determinism of time and place and circumstance.

5. Division of power between the nation and the states.

Americans, as a people, have been traditionally afraid of concentrated political authority. This explains their steadfast belief in the principle that power should be split up and divided around. First of all, it is divided between the nation and the states. The states have rights, and these rights must be respected by the national government. Similarly the states must leave the national government supreme within its own field. One must not interfere with the other. The supposed advantage of this arrangement is that it prevents any one government from becoming too strong. When the national constitution was framed there was a widespread fear that it would become too powerful and ultimately transform the states into mere administrative divisions of the Union. This fear persisted for many years after 1787. Most of it has now passed away, although ardent champions of states' rights still sound the tocsin from time to time. With virtual unanimity the people of the United States remain convinced that power should continue to be divided between the state and national governments, but they are no longer afraid of shifting authority from the states to the nation whenever the public interest seems to demand such a change.

The growing centralization.

In other words the American philosophy of government retains its allegiance to federalism but not to any particular brand of federalism. To abolish the state governments and concentrate all governmental responsibility in Washington would involve excessive centralization. The mechanism would break down of its own sheer cumbrousness. On the other hand the scattering of too much power among the states has the disadvantage of crippling the national government's endeavor to cope with nation-wide problems in an effective way. So the line of demarcation between the two sets of governmental powers is being gradually moved upward. The country is moving in that direction slowly, but steadily, relaxing the emphasis on federalism, state sovereignty, states' rights and local self-determination in favor of nationalism, national policy, and centralized power.

6. The principle of checks and balances.

It is a widespread, although hardly a universal popular conviction in the United States that power should not only be divided between the nation and the states but that within each government one branch should serve as a check upon the other. It is in accordance with this principle of counterpoise that the American national and state governments are organized. The executive, legislative, and judicial branches are kept separate and independent of each other. The President's veto serves as a check on Congress; the Senate's authority to confirm appointments and to ratify treaties is intended to serve as a check on the President; while the Supreme Court's right to declare laws unconstitutional operates as a check on the elective branches of government. The entire structure of American government, in fact, is based upon the idea that it is the inevitable tendency of governments to become oppressive and that individual officeholders and groups of officers will abuse their powers if given the opportunity. They will go forward in this direction until they are checked. Hence power shall be an automatic counterpoise to power. Sometimes, perhaps, this check is too effective, and delays the operations of government; but it is a measure of safety and most Americans believe it a wise one in spite of its defects.

Is it losing ground?

Nevertheless there are signs that the principle of checks and balances is beginning to lose its traditional popularity. The past few years have seen legislative powers of vast and far-reaching consequence handed over by Congress to the President, with no such nation-wide chorus of popular protest as it would have inspired a generation ago. The authority of the governors has similarly been growing at the expense of the state legislatures. In a word, the old balance is being rudely disturbed. The checks are being weakened. This is because the people seem to have lost, in large measure, their old-time fear of executive dictatorship. For the moment, at any rate, they are more interested in leadership than in deliberation, more concerned about having an efficient government than disturbed by the danger of not having a safe one. The American Republic is today the only great government which retains the principle of checks and balances. If the steady expansion of executive authority continues it will not retain that distinction very long.

Most despotisms have been created through the placing of rulers above the law. Laws are known and certain, while the will

7. A government of laws, not of men.

of a ruler is uncertain and subject to the vagaries of human nature. It cannot be foretold in advance. Therefore it is a precaution of American government that the laws should provide for all eventualities and leave to executive discretion just as little as possible. Of course it is not possible to have a government of laws alone—because laws do not promulgate, or interpret, or enforce themselves. Action on the part of public officials is necessary for their just application. Action on the part of judicial officers is necessary in order that the laws may be interpreted and enforced.

In some European countries it is the practice to enact the laws in general terms, leaving the details to be filled by executive orders. Such methods are repugnant to the American philosophy of government because they bestow upon individual officers too much discretion, and individual discretion opens the door to uncertainty, favoritism, and injustice. Nevertheless, and in spite of the government-of-laws tradition, both the national and the state political systems in the United States have been moving steadily towards a government of men. Laws are being enacted in broad language, after the European fashion, leaving all details (and sometimes details of supreme consequence) to be supplied by the issue of executive orders or by the rulings of administrative boards. Hence executive and administrative latitude is widening year by year. It must inevitably be so, because the more complicated a civilization becomes, the more essential it is to broaden the range of official discretion.

One result of it.

Meanwhile the belief of the American people in a government of laws has resulted in an outpouring of legislation such as the world has never seen before. Faith in the remedial efficacy of law is more deeply rooted in the United States than in any other country. There are millions who seem to believe that their fellowmen can be made rich or righteous, industrious or intelligent, productive or patriotic, by the wizardry of statutes and ordinances. When the average citizen sees anything amiss, his first impulse is to suggest that "There ought to be a law—." By statute he hopes to make the idle industrious, the improvident thrifty, the drunken sober, and the vicious virtuous. Hence there are laws and ordinances relating to almost every detail of American life from the length of freight trains to the brevity of bathing suits. But the zeal of the American democracy for the making of laws has been matched by a rather indifferent success in enforcing

them. The public imagination is slow to sense the fact that when a law is enacted the job is only half done, or less than half done. The hardest part of it is still ahead.

8. Judicial review.

In most European countries the lawmaking body is supreme. It has the last word. No court can set aside its actions. In Great Britain, for example, the highest court is the high court of parliament. There is nothing superior to a legislative enactment. No British court can declare a statute unconstitutional when once it has been enacted by parliament and has received the royal assent. But in the United States the national constitution is superior to all lawmaking authority, whether in the nation or the states, and the Supreme Court has assumed the function of nullifying any law which contravenes it. This right of the courts to examine into the constitutionality of all laws is an outstanding feature of American government. It arises from the fact that both the nation and the states have adopted written constitutions which contain limitations upon the powers of lawmaking bodies. Obviously a written constitution would not be obeyed if there were no authority to enforce obedience, and the courts are the logical agencies of legal compulsion. Constitutions without courts to compel their observance would be mere scraps of paper. Hence the doctrine of judicial review has become an essential cornerstone of the American political system.

The objection is frequently raised that this practice of judicial review gives the courts too much authority. And if it were true that the Supreme Court could set aside national laws at its own discretion, this would assuredly constitute a form of judicial despotism; but no court ever nullifies a law for the mere reason that the judges consider it unwise or unnecessary. Courts do not pass upon the wisdom or the expediency of laws. They declare a law invalid only when it infringes a constitutional provision which the people have themselves set up to restrain their lawmakers. What the courts do, therefore, is not to thwart the popular will, but to make it more effective. By applying the principle of judicial review, moreover, a constitution is adapted to the new needs of a growing country. It is shorn of its inherent rigidity.

9. Equality before the law.

Back in the eighteenth century, when the Constitution of the United States was framed, there were privileged classes in most countries of continental Europe. In France before the Great Revolution of 1789, for example, the nobility and the clergy had

all sorts of special rights and immunities. Even in England there were certain special privileges which members of the peerage enjoyed by law. The founders of the American political system took measures to forestall, so far as practicable, any such class discrimination in the United States. To the extent that the laws can prevent it, no class or creed or section in the United States has any special privilege. They are equal before the law.

It is true, of course, that people cannot be made equal in fact. Neither laws nor constitutions can avail to accomplish this. For it is the order of nature that human beings shall differ in physical strength, intelligence, industry, wealth, and general capacity. No ordinance of man, accordingly, can avail to make all citizens equal, or keep them equal, in competence and resources. But a constitution can make them equally subject to the laws of the land, and can place them equally within the jurisdiction of the courts. That is what Thomas Jefferson probably had in mind when he wrote of equality as "the denial of every preëminence but that annexed to legal office, and particularly the denial of a preëminence by birth." Equality, to the American mind, is a juristic concept, to be interpreted in connection with the democratic theory of equal justice and a square deal before the law. It is the declaration of an ideal, not a state of affairs. It is not something that exists, but something to be labored for.

Equality and security.

Equality, in recent years, has been to some extent confused with security. Economic inequality, as represented by big business on the one hand and low-paid labor on the other, is being widely regarded as a mainspring of economic insecurity. Hence there are many who think that the poor can be made rich by the simple device of making the rich poor. If that could be done the world would have learned the art long ago, for it has tried the experiment a great many times. Political and legal equality, however, cannot exist side by side with a too-great spread in economic status. Those who own the earth are likely to rule it. Accordingly there is a growing popular conviction that both political and economic security for the common man require the placing of checks upon the spread of economic inequality. The social security legislation of 1935 and the drastic raising of taxes upon the rich were in keeping with this idea.

10. Trial by jury.

The dogma of legal equality provides a groundwork for the jury system. The great majority of Americans regard the jury as an

indispensable bulwark of civil liberty, although most of them also appreciate the fact that the system of trial by jury does not always operate satisfactorily. They consistently oppose all proposals to abandon or even restrict it. Rightly so, for the requirement of trial by jury is perhaps the most dependable of all formal safeguards against the abuse of governmental power. It gives every person the privilege of proving his innocence or establishing his civil rights before a group of his fellow citizens drawn by lot from among his own neighbors. Thus it makes legal equality real. Oppressive laws may be enacted by legislatures, but such laws cannot be enforced unless juries are willing to coöperate, which is another way of saying that oppressive laws cannot be enforced unless the people approve their enforcement. A jury is merely a small cross-section of the electorate and reflects the popular will with a good deal of fidelity. Hence lawmakers must always keep in mind the fact that no statute can be made effective if juries believe its provisions to be unreasonable or arbitrary. In a word the jury system helps to keep law in tune with public opinion. It provides a link between the judicial hierarchy and the electorate.

11. Universal suffrage and the secret ballot.

The people of the United States have committed themselves to the principle that adult citizens of both sexes (with certain restrictions as to residence and literacy) shall be entitled to an equal vote at all elections. This is a relatively recent article in the political creed of the American people, but it has come to stay. There is no likelihood that the country will ever see a return to property qualifications or to manhood suffrage. Universal suffrage means that nearly half the total population is eligible to be enrolled as voters, which makes the American electorate the largest single electorate in the world. It is so large that only a portion of it understands most of the complicated issues which come up for decision at the polls.

The electorate functions through what we call the pressure of public opinion and by periodically using the ballot. It is an accepted principle in the United States that a voter shall have one vote only and that the ballot which he uses shall be a secret one. But it is not yet a generally accepted rule that the ballot shall be short, simple, and intelligible as well as secret. Accordingly, the process of government has been protected against intimidation but not against electoral helplessness. Proportional representation,

which made such striking progress in European countries after the close of the World War, has as yet gained no considerable foothold in America. This is partly because political minorities in the United States do not urgently feel the need of it as a protection against the oppression of majorities.

12. No establishment of religion.

In some European countries there is an established church, in other words a religious organization which is officially recognized to the exclusion or to the subordination of other religious bodies. In some cases this established religion receives financial assistance for its churches or its schools out of the public treasury. In a few instances the connection is so close that the higher officials of the church are appointed (or their appointments are confirmed) by the national government. All such interlocking of political and ecclesiastical organization is regarded by most Americans as detrimental to the best interests of church and state alike. Hence a complete separation of the two has been maintained in the United States since the Revolution. The national constitution forbids any establishment of religion by action of Congress, or the passing of any law which limits the free exercise of religious belief, or which sets up any religious test for the holding of public office. The principle of religious toleration is thus embedded in the supreme law of the land and may not be infringed by any action of the national authorities. Most of the state constitutions contain similar provisions as a limitation upon the powers of their legislatures. Under these provisions no religious body may be given special privileges which are denied to other such bodies, and no public funds may be appropriated for sectarian purposes.

13. Local self-government.

There are two general methods of organizing the government of local communities. One is to make all such governments uniform in plan and to place them under the control of the central authorities. This is the arrangement in the French Republic. All communes (that is, all villages, towns, and cities with the exception of Paris) have been given the same general framework of local government and are then held under the rigid supervision of the national authorities. Local government in France is organized in the form of a pyramid, with the mayors of the communes at the base and the President of the Republic at the apex.

The other method of organizing local government is to require no general uniformity, but to let each county, town, or city endow itself with whatever form of government it may see fit. Under this

plan of unstandardized local organization every community is accorded a large measure of freedom in the administration of its own affairs. This concept of local self-determination gained its first general acceptance in England and was brought to America in colonial days. There it quickly gained a foothold in the Virginia county and the New England town, whence it spread throughout the entire country.

The American philosophy of government still leans strongly to this principle. It accepts, in general, the proposition that people should be allowed to administer their own local affairs in their own way. The presumption is against rigid supervision from above. But local self-determination must necessarily be limited by regulations made in the general interest, for no community lives by itself in these days of closened contact. Each comes into daily touch with other communities whose interests may be adversely affected by a misuse of local freedom. Conflagrations and epidemics do not stop at town boundaries hence laxity in one municipality may visit unmerited penalties upon its neighbors. For that reason each community cannot be permitted entire self-decision in the matter of protecting itself against fire or disease. Local home rule is a worthy ideal and the onus should continue to be upon him who advocates a departure from it; but with the interlocking of urban communities the obstacles to it are increasing.

14. Government by political parties.

Although political parties are not mentioned at all in American constitutions, and are rarely mentioned in the laws, they ramify deeply into all the practical aspects of government and profoundly influence the citizen's attitude towards it. Parties have their origin in the differences of opinion which necessarily arise concerning political questions; but they secure their direction, and most of their momentum, from economic issues. If all men had the same worldly interests it would be difficult to maintain party organizations as we now have them. The desire to secure, or to preserve, economic advantages is a strong and continuing impetus to party strength.

Americans as a whole believe in the two-party system and most of them hold to the fiction that the two major parties reflect fundamental differences in the political convictions of the people. This, however, the major parties have ceased to do. Both of them are now wholly dissociated from their original professions of political belief. Today they are mottled composites of opinion based on tradition, inheritance, race, religion, occupation, or locality. The

English historian, Macaulay, once declared that the natural division of men is between those who want to hold back and those who want to push forward, in other words that all men are by nature reactionaries or progressives, conservatives or liberals. This is probably true, yet the major political parties have not followed any such line of cleavage in the United States. There are reactionaries in both of them, and progressives in both. The party label gives no clue to the wearer's point of view. Hence the assumption that party government gives the voter a choice between alternatives is by no means well-founded in America. In the United States the political issues do not create the parties, as in European countries: the parties create the issues, or seize upon them as a means of sustenance. The American philosophy of two-party government does not square with the facts of it. For this reason there are many who believe that there should be a realignment of parties, discarding the old traditions and establishing a new division based upon the national cleavage between conservatives and liberals. Logic would dictate such action, no doubt, but it does not have much influence in politics. Habit is a stronger determinant of political action, especially when it has been continued for several generations.

15. Economic individualism.

The social order which exists today in most countries of the world is known as economic individualism, or the capitalistic system, to distinguish it from the various forms of collectivist organization, including socialism, and communism. Under an individualistic social order most of the property in a country belongs to individuals, or to groups of individuals known as corporations; under a collectivist organization of society all wealth belongs to the community,—it is not owned by individuals or corporations, but by the whole people. Italy, under a Fascist government, retains the system of private property and private enterprise, but has placed both under a large measure of governmental restraint in the public interest. The same is true of the Nazi government in Germany. But Russia, under a communist system, has abolished virtually all private ownership of property.

Its constitutional basis.

Individualism and private property form the basis of the social and economic organization in the United States. The whole economic structure rests upon it, and our political philosophy has adjusted itself to this arrangement. The national constitution requires that no person shall be deprived of life, liberty, or *property* without due process of law. This sense of security, this assurance

that what a man earns and saves shall be his own, not to be arbitrarily taken away from him for the benefit of others less industrious or thrifty—this guarantee has been the bulwark of the American economic system since the beginning.

Limitations upon it.

But the right of property has never been looked upon in America as an inviolable right, a right which a man may use to the detriment of others. Rights of private ownership are subordinate to the public interest. The ownership of property by individuals can be justified only if they regard themselves as trustees for the common well-being. In earlier days the strong presumption was against any interference with private property or business, and the national tradition still tends that way; but during the past few years the sanctity of private ownership has been losing a good deal of its hold on the public allegiance. The government, as the representative of the public interest, has been encroaching upon private property and freedom of contract through the broader exercise of its taxing and police powers. The United States has been slowly swinging away from its extreme attachment to individualism and has been placing various erstwhile private enterprises under public control, but it has not yet gone nearly so far as the countries of continental Europe. Banking and the issue of securities have been brought under rigid governmental supervision; the same is true of the railroads, the public utilities, and the insurance companies. By the congressional legislation of the past few years the attempt has been made to establish a degree of control over the operations of agriculture and industry far exceeding anything heretofore known in the United States. These attempts bear witness to the gradual weakening of the old economic philosophy.

16. International isolation.

Finally, it is a principle of the American faith that the nation should keep from becoming entangled in the vicissitudes of European diplomacy by avoiding alliances or even international understandings of any sort. To such a depth is this tradition rooted that the United States, during the World War, officially insisted on being known as an "associated" power rather than as one of the Allied Powers. Fundamentally it was the strength of this aversion to international entanglements that kept the country from adhering to the covenant of the League of Nations and to the protocol of the World Court. America will not be drawn into European quarrels, and by the same token will not permit European aggression in any part of the New World. The Monroe

Doctrine is not a rule of international law, but it is one of the chief pillars in the temple of American political conviction. On this sixteenth article of his faith the average American is not open to argument. He is a fundamentalist when it comes to American entanglements abroad or foreign intervention over here.

In conclusion.

Every government rests on the faith of its people. The foregoing outline of a political creed does not exhaust the category of principles in which the American citizenship believes. There are others which will readily suggest themselves to anyone who gives the matter a little thought. As a philosophy of government in the twentieth century it leaves a good deal to be desired; on the other hand it will stand comparison with that of any other country. Measured by the results of its application to the rulership of more than a hundred and twenty million people it is by no means to be ranked as a Cinderella among confessions of political faith. Yet no nation should commit the folly of regarding any principle of government as rigid and unchangeable for all time. Principles, like methods, should be modified as circumstances require. Theories should be drawn into articulation with the facts. For government is a going concern, maintained for the benefit of the governed, and not as an end in itself.

A final quotation—full of wisdom.

"Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce and honest friendship with all nations,—entangling alliances with none; the support of the state governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; . . . freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected,—these principles form the bright constellation which has gone before us and guided our steps." These clarion words of Thomas Jefferson, as uttered in his first inaugural, embody a nugget of prophetic sagacity which Americans in all generations would do well to treasure.

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biannual - occuring 2 in 1 yr.
biennial - " every 2 nd yr.

12:15-
1:95-
2:15

APPENDIX

CONSTITUTION OF THE UNITED STATES

WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes [1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

[1] See the sixteenth amendment, *below*, p. 779.

[2] Partly superseded by the fourteenth amendment, *below*, p. 778.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.[1]

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[2]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

[1] See the seventeenth amendment, *below*, p. 779.
[2] *Ibid.*

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[1]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[2] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed

[1] See the sixteenth amendment, *below*, p. 779.

[2] The following paragraph was in force only from 1788 to 1803.

to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[1]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

[1] Superseded by the twelfth amendment, *below*, p. 777.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;[1]—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

[1] See the eleventh amendment, p. 777.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of

three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

SECTION 1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

SECTION 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

SECTION 3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GO: WASHINGTON—
Presidt. and Deputy from Virginia

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[1] The first ten amendments adopted in 1791.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI [1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII [2]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitu-

[1] Adopted in 1798.
[2] Adopted in 1804.

tionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII [1]

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV [2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[1] Adopted in 1865.
[2] Adopted in 1868.

ARTICLE XV [1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI [2]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII [3]

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [4]

SECTION 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of submission thereof to the States by the Congress.

ARTICLE XIX [5]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.

[1] Adopted in 1870.

[2] Passed July, 1909; proclaimed February 25, 1913.

[3] Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the constitution and so much of paragraph two of the same section as relates to the filling of vacancies; proclaimed May 31, 1913.

[4] Proclaimed January 29, 1918. Repealed by the twenty-first amendment.

[5] Proclaimed August 26, 1920.

SECTION 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

ARTICLE XX [1]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI [2]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[1] Proclaimed October 15, 1933.
[2] Proclaimed December 5, 1933.

INDEX

Adams, John, 35; on political parties, 125.
Adams, John Quincy, election of, as President, 161.
Adams, R. G., *Political Ideas of the American Revolution*, 27.
Adamson law (1916), 421, 448.
Adkins *v.* Children's Hospital, 103 *n.*
Administration, national, and the cabinet, 213–238; and the independent and emergency services, 240–259.
Administrative discretion, delegation of, 486–487.
Administrative law, growth of, 487–488.
Administrative services, in national government, 240–259; permanent, 242–250; miscellaneous independent, 250–252; emergency, 252–258.
Admiralty law, 511–512.
Agar, Herbert, *The People's Choice*, 180, 212.
Agricultural adjustment act (1933), 78–79, 354–355, 447–448.
Agricultural adjustment administration, 233 *n*, 253–254.
Agriculture, federal department of, 232–233; relation of Congress to, 446–448; *Agricultural Adjustment in 1934*, 452.
Air force, 229.
Air-mail service, 467.
Alaska, purchase, 491; government of, 232, 493–494.
Albany Congress (1754), 24.
Alexander, D. S., *History and Procedure of the House of Representatives*, 311, 332 *n*, 334.
Alexander, N., *The Rights of Aliens under the Federal Constitution*, 105.
Ambassadors, appointment of, 193.
Amendments to the constitution, 83–86; the first ten, 85; eleventh, 85–86, 513; twelfth and thirteenth, 86; fourteenth, 384–385; fifteenth, 109–110; sixteenth, 359; seventeenth, 265–267; eighteenth, 86; nineteenth, 113–114; twentieth, 168–169, 308–309; twenty-first, 86.
American Institute of Weights and Measures, *Our American System of Weights and Measures*, 476.
American Political Science Review, 13.
American Steel *v.* Speed, 356 *n.*
American Tobacco Company Case, 437.
American Year Book, 386.
Anderson, T. J., Jr., *Federal and State Control of Banking*, 408.
Andrews, Charles M., *The Colonial Period of American History*, Vol. I, The Settlements, 27; *Colonial Self-Government, 1652–1689*, 27; *The Colonial Background of the American Revolution*, 27.
Andrews, J. B. *See* Commons, J. R.
Annals of the American Academy of Political and Social Science, "Increasing Government Control in Economic Life," 451; *Social Insurance* (C. A. Kulp, ed.), 452; "The Administration of Justice," 524; *Lobbying*, 334.
Annapolis Convention (1786), 37–38.
Anti-Federalist party, 124.
Anti-Masonic party, 131.
Appointments, by the President, 185–186; confirmation by the Senate, 279–280; recess, 280–281.
Apportionment, in House of Representatives, under Method of Major Fractions, 300 *n;* under Method of Equal Proportions, 300 *n.*
Appropriation bills, origin of, in House of Representatives, 292, 376–377; early plans of considering, 371–373; procedure under new budget system, 374–378; passage through Congress, 375–378; riders in, 377; compared with European methods, 379. *See also* Finance.
Archbold, Judge, impeachment of, 290 *n.*
Aristotle, on principle of division of powers, 40; *Politics*, 65 *n.*
Armstrong, B. N., *Insuring the Essentials*, 451.
Army organization act of 1920, 461 *n.*
Army, supervision of the, 227–228; control of President over, 205–207;

size of, 455; volunteer, 455; national, 455.
Arneson, B. A., *Elements of Constitutional Law*, 72.
Arsenals, forts, etc., power of Congress over, 462.
Articles of Confederation, 26, 28; importance of, 29; influence on the constitution, 29–30; general provisions of, 30–31; functions of executive under, 31; ratification of, 31; delegation of powers under, 336.
Ashley, P. W. L., *Modern Tariff History: Germany—United States—France*, 433.
Assessment. *See* Taxation.
Atkinson, C. R., *The Committee on Rules and the Overthrow of Speaker Cannon*, 334.
Attainder, bills of, 477–478.
Attorney-general, appointment of, 214; head of the department of justice, 229–230.
Attorney-General, Opinions of the, 229.
Australian ballot, use of, in congressional elections, 303.

Bagehot, Walter, quoted, 213.
Bailey *v.* Drexel Furniture Co., 412 *n*, 413 *n*, 531 *n*.
Baird, F., and Benner, C. L., *Ten Years of Federal Intermediate Credits*, 408.
Baker, Ray Stannard, *Life and Letters of Woodrow Wilson*, 212.
Baldwin, S. E., *The American Judiciary*, 524.
Ballard, G. A., *America and the Atlantic*, 464.
Bancroft, George, *History of the Formation of the Constitution*, 38–39, 59.
Banking system, federal, 392–407; history of, 392–407; power of Congress to charter banks, 392–395; act of 1863, 396–397; defects in, 397; federal reserve, 397; merits and shortcomings of, 400; collapse of, 401; emergency act of 1933, 401; insurance of deposits under, 402; relation of state banks to, 402.
Bankruptcy, power of Congress over, 343, 471–472.
Barrett, J. A., *Evolution of the Ordinance of 1787*, 36 *n*.
Barrows, David P., *History of the Philippines*, 506.
Bassett, John S., *Short History of the United States*, 505.
Beard, Charles A., on judicial supremacy, 69 *n*; *American Government and Politics*, 12; *An Economic Interpretation of the Constitution of the United States*, 43 *n*, 57 *n*, 59; *The Supreme Court and the Constitution*, 67 *n*, 69 *n*, 544; *The American Party Battle*, 139; *The Open Door at Home*, 433; *The Navy: Defense or Portent?*, 464; and Beard, Mary R., *The Rise of American Civilization*, 36 *n*, 59, 505; and Smith, G. H. E., *The Future Comes: A Study of the New Deal*, 239, 260, 451; and Beard, William, *The American Leviathan*, 476.
Beard, William, *Government and Technology*, 451.
Beck, James M., *The Constitution of the United States*, 59; *Our Wonderland of Bureaucracy*, 238, 476.
Becker, Carl L., *The Declaration of Independence*, 27; *Our Great Experiment in Democracy*, 88.
Beckhart, B. H., *The Discount Policy of the Federal Reserve System*, 408. *See also* Willis, H. P.
Beer, George L., *Origins of the British Colonial System, 1578–1660*, 19 *n*, 26; *British Colonial Policy, 1754–1765*, 19 *n*, 27; *The Old Colonial System, 1660–1754*, 26–27.
Belknap, William, impeachment of, 288, 290.
Beman, L. T., *The Abolishment of the Electoral College*, 179–180.
Bent, Silas, *Justice Oliver Wendell Holmes*, 544.
Berdahl, C. A., *The War Powers of the Executive in the United States*, 206 *n*, 211. *See also* Mathews, John M.
Bernays, Edward L., *Crystallizing Public Opinion*, 154.
Bernhardt, J., *The Interstate Commerce Commission: Its History, Activities and Organization*, 259, 433.
Bernheim, Alfred L., and others, *Labor and Government*, 452.
Better Government Personnel; Report of the Commission of Inquiry on Public Service Personnel, 211.
Beveridge, Albert J., *Life of John Marshall*, 60, 394 *n*, 529 *n*, 544.
Beveridge, Sir William, *The Past and Present of Unemployment Insurance*, 452.
Bicameral system, adoption of, in Congress, 261–262.
Bicknell, Edward, *Territorial Acquisitions of the United States*, 505.
Bidwell, B. A., *The Tariff Policy of*

the United States: A Study of Recent Experience, 433.
Bigham, Clive, *The Prime Ministers of Great Britain*, 170 *n.*
Bill of Rights, in original state constitutions, 32–33; rights of citizens secured by, 101–102, 519–523; in state constitutions, 102, 568; in relation to war, 462–463; limitations on courts and judicial procedure in, 519–524.
Bills, passage of, by agreement of Senate and House, 200–201; vetoing, procedure in, 200; in House of Representatives, 327–333; introduction of, in House of Representatives, 327–328; of attainder, 477–478. *See also* Veto power.
Billson, W. W., *Equity in Its Relations to the Common Law*, 524.
Bimetallism, the conflict over, 388–389.
Bishop, J. B., *Presidential Nominations and Elections*, 179; *Theodore Roosevelt and His Time*, 212.
Bispham, G. T., *The Principles of Equity*, 524.
Blachly, F. F., and Oatman, M. E., *Administrative Legislation and Adjudication*, 211, 238.
Black, H. C., *Handbook of American Constitutional Law*, 72; *The Relation of the Executive Power to Legislation*, 211; *The Construction and Interpretation of Laws*, 524.
Black, J. D., *Agricultural Reform in the United States*, 452.
Blackstone, quoted, 1; endorsement of separation of powers, 65; *Commentaries*, 65.
Blaisdell, T. C., Jr., *The Federal Trade Commission*, 259.
Blount, William, impeachment of, 290.
Bogart, E. L., *War Costs and Their Financing*, 386, 463.
Bonbright, J. C., and Means, G. C., *The Holding Company: Its Public Significance and Its Regulation*, 434.
Bonds, federal, types of, 382–384; refunding of, 385; state and municipal, power of Congress in relation to taxation of, 360–361; refunding, in states and cities, 385.
Boothe, V. B., *The Political Party as a Social Process*, 139.
Borrowing, powers of Congress in, 381–385; absence of limitations on, 381; methods of, federal, 383–384.
Boudin, Louis B., *Government by Judiciary*, 544
Bowers, Claude G., *Jefferson and Hamilton*, 124 *n*, 138; *The Party Battles of the Jackson Period*, 138; *The Tragic Era*, 138; *Beveridge and the Progressive Era*, 138.
Boyle, J. E., *Farm Relief*, 452.
Brane, D. DeW., *A Sequential Science of Government*, 561.
Brannon, H., *The Rights and Privileges Guaranteed by the Fourteenth Amendment*, 489.
Brinkmann, Carl, *Recent Theories of Citizenship in Its Relation to Government*, 104.
Brogan, D. W., *Government of the People*, 12.
Brooks, R. C., *Political Parties and Electoral Problems*, 121, 139, 179.
Brown, G. R., *The Leadership of Congress*, 312, 334.
Brown, H. G., *The Economics of Taxation*, 368.
Brown, John, executed for treason, 479.
Brown, L. G., *Immigration*, 433.
Bruce, H. R., *American Parties and Politics*, 139.
Bryan, W. B., *History of the National Capital*, 506.
Bryan, William J., 215, 389.
Bryce, Lord, on the American constitution, 74; on need for organization of parties, 144; on the presidency, 169; on the Supreme Court, 525; estimate of John Marshall, 530; *Hindrances to Good Citizenship*, 105; *The American Commonwealth*, 7 *n*, 169 *n*, 530 *n*.
Buchanan *v.* Warley, 483 *n*.
Buck, A. E., *Public Budgeting*, 386; *Budget in Governments of Today*, 386.
Buck, Solon J., *The Agrarian Crusade*, 138.
Budget, federal bureau of the, 248–249, 374–375.
Budget system, federal, 371–381; value, 379–380; defects of, 380. *See also* Appropriation bills.
Bullard, Arthur, *American Diplomacy in the Modern World*, 211.
Bullock, C. J., *Selected Readings in Public Finance*, 368.
Bunker, F. F., *Hawaii and the Philippines*, 505.
Bunn, C. W., *Jurisdiction and Practice of the Courts of the United States*, 524.
Burchfield, Laverne, *Student's Guide to Materials in Political Science*, 13.

Burdick, Charles K., *Law of the American Constitution*, 72, 350.
Burgess, W. R., *The Reserve Banks and the Money Market*, 408.
Burke, Edmund, on forms of government, 87; quoted, 296; on the duty of representatives, 306.
Burr, Aaron, election of, as Vice President, 160; acquitted of treason, 479.
Busbey, L. W., *Uncle Joe Cannon*, 155.
Butler, C. H., *The Treaty Making Power of the United States*, 294–295.
Butler, Pierce, in constitutional convention of 1787, 43.
Byron, Lord, quoted, 5.

Cabinet, development of, by usage, 82; and national administration, 213–238; compared with English cabinet, 213, 237–238; attitude of constitutional convention towards, 213; offices established by President and Congress, 214–215; qualifications for appointment to, 215–217; powers and functions of, 217–219; meetings, 218–219; its relation to the President, 218; to Congress, 237–238.
Cable act (1922), 97–98.
Calder *v.* Bull, 478 *n.*
Calhoun, John C., on nullification, 337; *State Papers on Nullification*, 337 *n.*
California *v.* Central Pacific R. R. Co., 468 *n.*
Callender, C. N., *American Courts*, 524.
Calvert, Thomas H. *See* Meigs, W. M.
Campaign funds, 150–152.
Cannon, Joseph, on duty of representatives, 306.
Caribbean Islands, relation to the United States, 501–502.
Carpenter, Edmund J., *America in Hawaii*, 505.
Carpenter, W. S., *Judicial Tenure in the United States*, 544; *The Development of American Political Thought*, 561.
"Carpet-bagger," 305.
Carroll, M. R., *Labor and Politics*, 139.
Carter, J. C., *Law: Its Origin, Growth and Function*, 524.
Carter, W. G. H., *The American Army*, 463.
Castle, W. R., Jr., *Hawaii, Past and Present*, 505.
Catlin, G. E. G., *A Study of the Principles of Politics*, 561.
Catt, C. C., and Shuler, N. R., *Woman Suffrage and Politics*, 121.
Catterall, R. C. H., *Second Bank of the United States*, 395 *n.*
Caucus Club of Boston, 144.
Caucus, legislative, 145; in the Senate, 273–274; in the House of Representatives, 326.
Central American republics, relation to the United States, 501.
Chafee, Zechariah, Jr., *Freedom of Speech*, 463 *n.*
Chain Store Tax Case (1931), 531.
Channing, Edward, on election of Jackson to presidency, 127; *History of the United States*, 19 *n*, 27, 32 *n*, 38, 69 *n.*
Chapman, J. M., *Fiscal Functions of the Federal Reserve Banks*, 408.
Chase, Salmon P., as secretary of the treasury, 227; as chief justice, 528 *n.*
Cherrington, E. H., *The Evolution of Prohibition in the United States*, 138.
Cheyney, E. P., *Law in History*, 16 *n; European Background of American History, 1300–1600*, 26.
C. B. & Q. R. R. *v.* Illinois, 482 *n.*
Child labor, under control of department of labor, 234; attempted regulation of, by Congress, 412–413.
Child Labor Tax Case (1922), 531.
Children's bureau, 234.
Childs, H. L., *Labor and Capital in National Politics*, 452.
Chisholm *v.* Georgia, 85, 512 *n*, 528 *n.*
Cicero, quoted, 351.
Circuit court of appeals, 539–540.
Citizens, rights of, 89–104; who are, 89–91; by birth, 91–93; by naturalization, 93–97; of wives and children, 97–98; constitutional status of Puerto Ricans and Filipinos, 94; privileges and immunities of, 89–91, 106–120; corporations as, 98–99; equality of, 99; suffrage not a constitutional right of, 100; duties of, 103–104; in relation to voting, 106–107.
Citizenship, 89–93. *See also* Naturalization.
Citizenship of the United States, 105.
Civil service commission, federal, 248.
Civil service system, in national government, 189–190.
Civil War, increase of national debt during, 382.
Civilian conservation corps, 257–258.

Clark, E. (editor), *The Internal Debt of the United States*, 386.
Clark, G. R., and others, *A Short History of the United States Navy*, 464.
Clark, Henry W., *History of Alaska*, 505.
Clark, J. P., *The Deportation of Aliens*, 433.
Clark, Victor S., and others, *Porto Rico and Its Problems*, 505.
Clark, W. E. *See* Jenks, J. W.
Clay, Henry, as Speaker of the House of Representatives, 326.
Claybrook, J. N., *Patents*, 476; *Federal Courts*, 524.
Clayton act (1914), 438–439, 448.
Cleveland, F. A., *American Citizenship as Distinguished from Alien Status*, 104.
Cleveland, Grover, election of, as President, 167; use of veto power, 203; attitude towards pension bills, 203; *Presidential Problems*, 184 *n*, 210.
Coe, George A., *Educating for Citizenship*, 105.
Coinage and currency in the United States, 387–391.
Coke, Sir Edward, *Institutes*, 480 *n*.
Coker, F. W., *Recent Political Thought*, 561.
Collective bargaining, under national industrial recovery act, 255, 448–449.
Collector *v.* Day, 360 *n*.
Collier, W. M., *Collier on Bankruptcy*, 476.
Collins, C. W., *The Fourteenth Amendment and the States*, 489.
Colonies, the thirteen, government of, 15–26; political organization of, 17–21; royal supremacy in, 18–19; basis of government in, 18; legal system of, 22; federation of, 23–24; public opinion in, 25.
Comer, J. P., *Legislative Functions of National Administrative Authorities*, 211, 238, 350.
Commager, Henry S., *Documents of American History*, 13.
Commerce, federal department of, 233; power of Congress to regulate, under the constitution, 409–433; what it is, 410–411; relation of manufacturing to, 411–412; kinds of, 413–414; the tariff as a regulator of, 414–418; interstate, 420–430; division of authority over, between federal and state governments, 423; promotional activities of, 430–433. *See also* Interstate commerce.
Committee, national, of a political party, 146–149.
Committee of the Whole, in the House of Representatives, 325.
Committee on Committees, in the House of Representatives, 321–322.
Committee on Economic Security, Report of the, 452.
Committee on Rules, in the House of Representatives, 320.
Committee on Ways and Means, in the National House of Representatives, 321–322.
Committees, regular, in the House of Representatives, 321–325; chosen by party caucuses, 321–322; of conference, 324–325.
Common law, history of, 515–517.
Commons, J. R., and Andrews, J. B., *Principles of Labor Legislation*, 452.
Communist party, 131.
Comptroller-general, 226, 367, 374.
Conant, C. A., *A History of Modern Banks of Issue*, 408.
Congress, under Confederation, 28–37; weakness of, 30–31; lack of revenue, 34–35; lack of power to regulate commerce, 35; defects of, under the Confederation, 34–35; under the constitution, organization, 261–262; representation in, 48–50, 263–264; control of, by parties, 152; relation of President, 157; special sessions of, 196; relation to cabinet, 235–236; adoption of double chamber system, 261–262; leadership in, 309; powers in general, 335–350; express and implied, 341–342; mandatory and permissive, 342–343; exclusive and concurrent, 343–344; prohibited, by the constitution, 344–345; classified, 346; as a lawmaking body, 347–349; expanding powers of, 348; to tax, 351–367; to tax state and municipal bonds, 361; to borrow, 381–385; over currency, 387–391; to charter banks, 392–394; to regulate commerce, 409–433; over child labor, 412–413; over immigration, 418–419; to regulate industry, labor, and agriculture, 435–450; to raise and support armies, 453–458; to provide and maintain a navy, 458–459; over the militia, 461–462; relating to war, 462–463; other powers of, 465–476; over post offices, 465–467; to build post roads, 467; over weights

and measures, 468–469; to grant patents, 469–470; trade-marks, 470; and copyrights, 470; over naturalization and bankruptcy, 471–472; over offenses on the high seas, 472–473; over national capital, 473; grants-in-aid by, 474–475; limitations on, 477–488; in respect to treason, 478–479; delegation of legislative power, 486–487; control over territories, 490–505; control over procedure of federal courts, 519–520.
Congressional Directory, 312.
Congressional Record, 250, 273.
Connecticut Compromise, 49–50.
Constitution of the United States, its makers, 40–59; framing of, 40, 48–52; ratification, 52–58; influences responsible for adoption by the states, 55–57; the supreme law of the land, 61–72; unwritten, makers of, 61–62; embodiment of popular sovereignty, 62; a grant of powers, 62; adjustment of authority in, 63; division of powers in, 63–67; limitations in, 64–66, 70; doctrine of judicial supremacy in, 67–69; omissions in, 70–71; original and derived features of, 71–72; growth of, 74–88; by law, 76–77; by judicial interpretation, 77–80; by administrative rulings, 80; by usage, 80–83; by amendment, 83–84; process of amending, 84–85; amendments to, 85–86; amendment as a last resort, 86–87; suffrage under, 107–108; provision for heads of departments in, 214; general powers of states under, 336–341; treason under, 479; right of eminent domain under, 483–484; basis of territorial expansion under, 492–493.
Constitutions, state, original, 32–33, 562; flexible and rigid, 74–76; rights and duties of citizens under, 102–103.
Consular courts, 542.
Continental Congress, 25–26; powers of, 26.
Contract, freedom of, 482.
Convention of 1787, proposals for, 38; organization and members, 41–47; place of meeting, 41; types of men in, 41–46; leaders of, 44–46; work of, 48–52; ratification, 52–58.
Conventions, national, 163–166; nominating, 145–146, 163–165.
Cooke, F. H., *The Commerce Clause of the Federal Constitution*, 433.
Cooley, T. M., on suffrage, 106; quoted, 477; *Treatise on Constitutional Limitations*, 72, 105, 485 *n*, 488, 524.
Coolidge, Calvin, 82, 157, 458; inauguration of, as President, 169; appoints special commission on independence of Philippines, 498; *Autobiography*, 212.
Coolidge, Louis A., *An Old Fashioned Senator, Orville H. Platt*, 277.
Coombs, W. *See* Ellingwood, A. R.
Cooper, Russell M., *American Consultation in World Affairs for the Preservation of Peace*, 211.
Coöperative banks and production-credit corporations, 406.
Copyrights, power of Congress over, 470–471.
Corwin, E. S., "The Progress of Constitutional Theory between the Declaration of Independence and the Philadelphia Convention," 39; *The Doctrine of Judicial Review*, 67 *n*, 544; *The President's Removal Power under the Constitution*, 191 *n*, 211, 294; *The President's Control of Foreign Relations*, 211, 294; *The Twilight of the Supreme Court*, 544; *John Marshall and the Constitution*, 544.
Cost of government, in nation, 369–371. *See also* Expenditures, Finance, Appropriation bills.
Cotton, J. P. (editor), *The Constitutional Decisions of John Marshall*, 544.
Court of claims, 541.
Court of customs appeals, 541.
Courtesy, senatorial, 187, 279–280.
Courts. *See* Judiciary, Supreme Court.
Coxe, Brinton, *Judicial Power and Unconstitutional Legislation*, 544.
Crandall, S. B., *Treaties, Their Making and Enforcement*, 294.
Crecraft, E. W., *Government and Business*, 451.
Croly, Herbert D., *Marcus Alonzo Hanna*, 154, 277.
Cuba, relation to the United States, 501–502.
Cunningham, W. J., *American Railroads: Government Control and Reconstruction since 1920*, and *Supplement*, 433–434.
Curran, Henry H., *John Citizen's Job*, 105.
Currency, of the United States, 387–391; power of Congress over, 387;

gold and silver as, 387–388; colonial, 388; present welter of, 391.
Cushman, R. E., *Leading Constitutional Decisions*, 73. *See also* Orth, S. P.
Customs court, 541.

Daggett, Stuart, *Principles of Inland Transportation*, 434.
Dangerfield, R. J., *In Defense of the Senate*, 277. *See also* Ewing, C. A. M.
Danish West Indies, acquisition of, 491.
Dartmouth College *v.* Woodward, 481 *n*, 529 *n*.
Davis, Jefferson, *Rise and Fall of the Confederate Government*, 338 *n*.
Davis, John W., *Party Government in the United States*, 139; *The Treaty-Making Power in the United States*, 211, 295.
Dawes, C. G., *The First Year of the Budget in the United States*, 386.
De Bolt, J. T., *The Naturalization of Aliens and Their Duties as Citizens*, 105.
Debs *v.* United States, 463 *n*.
Debt, national, 381–385; beginnings of, 381–382; during Civil War, 382; present size of, 382–383; refunding, 385.
Declaration of Independence, 26.
Declaration of Paris (1856), 454.
Declaration of Rights, adopted by Continental Congress, 515–516.
Delaisi, Francis, *Political Myths and Economic Realities*, 561.
Democratic party, its origins, 125–127; history since 1828, 127–130.
Departments, federal, heads of, 214–221; appointment and removal, 214–216; responsible to President, 219–220; work of, 221–222.
Deportations, under immigration laws, 419–420.
Dewey, Davis R., *Financial History of the United States*, 368, 386, 389 *n*, 408.
DeWitt, B. P., *The Progressive Movement*, 138.
DeWitt, D. M., *The Impeachment and Trial of Andrew Johnson*, 295.
Dexter, W. F., *Herbert Hoover and American Individualism*, 212.
Diamonon, V. D., *The Development of Self-Government in the Philippine Islands*, 506.
Dicey, Albert Venn, quoted, 40, 567.
Dickerson, O. M., *American Colonial Government, 1696–1765*, 27.
Dickinson, John, in constitutional convention of 1787, 42, 46, 47.
Dickinson, John, *The Building of an Army*, 463; *Administrative Justice and the Supremacy of Law in the United States*, 489.
Dillon, John F., *John Marshall, Life, Character and Judicial Services*, 544.
Dimock, M. E., *Congressional Investigating Committees*, 293 *n*, 335 *n*. *See also* Haines, C. G.
District attorneys, federal, 540.
District courts, federal, 540–541.
District of Columbia, history and government of, 502–505; commissioners of, 503–504; control of Congress over, 473, 504; selection as site for national capital, 503.
Division of powers, in constitution, between nation and states, 62–64. *See also* Separation of powers.
Dixon, F. H., *Railroads and Government*, 434.
Dobie, A. M., *Handbook of Federal Jurisdiction and Procedure*, 524.
Documents, superintendent of, 251.
Dodd, W. E., *Woodrow Wilson and His Work*, 155, 212.
Dodd, W. F., *Cases and Other Authorities on Constitutional Law*, 73; *The Government of the District of Columbia*, 506.
Dougherty, J. H., *The Power of the Federal Judiciary over Legislation*, 88; *The Electoral System of the United States*, 179.
Douglas, Paul H., *The Coming of a New Party*, 138, 452; *Standards of Unemployment Insurance*, 451–452.
Dowrie, G. W., *American Monetary and Banking Policies*, 408.
Dred Scott *v.* Sandford, 89–90, 530–531.
Due process of law, 480–483.
Duffy, H. S., *William Howard Taft*, 212.
Dunbar, C. F., and Willis, H. P., *The Theory and History of Banking*, 408.

Eberling, E. J., *Congressional Investigations*, 293 *n*, 335 *n*.
Ecclesiasticus (Apocrypha), 58 *n*.
Education, federal office of, 232.
Edwards *v.* United States, 202 *n*.
Egerton, H. E., *Causes and Character of the American Revolution*, 27.
Election, effect of party organization

on, 144; money in, 151–152; of the President, 156–178; of senators, 263–267; of representatives, 303; contested, 303–304. *See also* Suffrage.
Electorate. *See* Suffrage.
Electors, presidential, 157–168.
Elkins act (1903), 421 *n.*
Ellingwood, A. R., *The Government and Railroad Transportation*, 434; and Coombs, W., *The Government and Labor*, 452.
Elliott, Edward, *Biographical Story of the Constitution*, 59.
Elliott, Jonathan, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 60.
Elliott, William Y., *The Need for Constitutional Reform*, 561.
Ellsbree, H. L., *Interstate Transmission of Electricity*, 434.
Ellsworth, Oliver, in constitutional convention of 1787, 42, 46.
Emerson, Ralph W., quoted, 12; on debating in House of Commons, 311.
Eminent domain, 483–484.
Encyclopaedia of the Social Sciences, The, 13.
England, control over American colonies, 18–19; constitution of, 74–75; cabinet in, compared with American, 213, 237–238; the exchequer, compared with treasury department, 224; origin of impeachment procedure in, 286–287; common law in, 515–516.
Epstein, A., *Insecurity: A Challenge to America*, 451; *Old Age Security*, 452.
Equity, 515–519.
Eriksson, E. M., and Rowe, D. N., *American Constitutional History*, 88.
Ervin, Spencer, *Henry Ford vs. Truman H. Newberry*, 154, 266 *n.*
Espionage and sedition acts, 463.
Ettrude, D. J., *Power of Congress to Nullify Supreme Court Decisions*, 544.
Evans, L. B., *Leading Cases on American Constitutional Law*, 73; (editor) *The Writings of Washington*, 124 *n.*
Evans *v.* Gore, 359 *n.*
Ewing, C. A. M., and Dangerfield, R. J., *Documentary Source Book in American Government and Politics*, 12.
Executive. *See* President.
"Executive orders," 199–200.
Expansion, territorial, of the United States, 490–492.
Ex parte Garland, 183 *n.*
Expenditures, federal, 369–381; increase of, 369–371; during war time, 370; effect of World War on, 373; chart of, 1916–1935, 372.
Export-import banks, 406, 418.
Exports, prohibition of tax on, 356–357.
Ex post facto laws, 478.

Fagan, Elmer D., and Macy, C. W., *Public Finance*, 368.
Fainsod, Merle. *See* Lien, Arnold J.
Fairchild, H. P., *Immigration*, 433.
Fairman, Charles, *The Law of Martial Rule*, 211–212, 460 *n*, 464.
Farm credit administration, 249, 403–405.
Farm loan bank system, and agricultural credit, 403–407.
Farmer-Labor party, 131.
Farrand, Max, *Records of the Federal Convention of 1787*, 45 *n*, 59; *The Framing of the Constitution*, 59; *The Fathers of the Constitution*, 59.
Federal communications commission, organization and powers of, 244–245, 427.
Federal courts, sphere of, 510–515; do not possess exclusive jurisdiction, 514; constitutional securities for fair trial by, 519–524; Supreme Court, 525–539; subordinate courts, 539–542; protection for the independence of, 542–543. *See also* Judiciary, Supreme Court.
Federal deposit insurance corporation, 250, 402.
Federal emergency relief administration, 255.
Federal government, installed, April 30, 1789, 58–59; detailed powers of, 62–64.
Federal highway act (1916), 468, 474.
Federal housing administration, 256–257, 407.
Federal land banks, 403–405; organization of, 403; functions of, 403–404.
Federal power commission, organization and functions of, 246–247.
Federal reserve bank system, 397–402.
Federal reserve board, 249, 398.
Federal trade commission, organization and functions, 243–244, 438–439.
Federalism, spread of, 15–16.

Federalist, The, 37 *n*, 56 *n*, 69 *n*, 122 *n*, 201 *n*, 281 *n*, 287 *n*, 298, 349, 354 *n*, 369, 509 *n*.
Federalist party, 124–126.
Few, Robert, in constitutional convention of 1787, 42.
Few, William, in constitutional convention of 1787, 43.
Field, Henry M., *The Life of David Dudley Field*, 544.
Field, O. P., *A Selection of Cases and Authorities on Constitutional Law*, 73; *The Effect of an Unconstitutional Statute*, 544.
Field *v.* Clark, 486 *n*.
Fifteenth amendment, defects of, 109–110.
Finance, national, place of treasury department in, 224–226; power of Congress over, 387–391.
Fine, Nathan, *Labor and Farmer Parties in the United States, 1828–1928*, 138.
Fish, C. R., *The Civil Service and the Patronage*, 211.
Fisher, S. G., *The Evolution of the Constitution of the United States*, 59.
Fisk, H. E., *Our Public Debt*, 386.
Fiske, John, *The Critical Period of American History, 1783–1789*, 39.
Fitzsimons, Thomas, in constitutional convention of 1787, 42.
Flack, H. E., *The Adoption of the Fourteenth Amendment*, 489.
Fleming, D. F., *The Treaty Veto of the American Senate*, 295.
Fletcher *v.* Peck, 69 *n*.
Follett, M. P., *The Speaker of the House of Representatives*, 316 *n*, 334.
Foltz, E. B. K., *The Federal Civil Service as a Career*, 211.
Foraker act of 1900, 495.
Forbes, W. C., *The Philippine Islands*, 506.
Ford, Henry J., *The Rise and Growth of American Politics*, 138, 275 *n*; *The Cost of Our National Government*, 386.
Ford, Paul Leicester, *Pamphlets on the Constitution of the United States*, 53 *n*; (editor) *Jefferson's Writings*, 176 *n*.
Foreign affairs, power of President in, 193–194, 222–223; in connection with Senate, 222; in relation to state department, 222–223.
Foreign commerce, power of Congress to regulate, 414–417; development of, 432.
Foster, Roger, *Commentaries on the Constitution of the United States*, 72, 295.
Fourteenth amendment, rights of citizens under, 90–91; basis of representation under, 112; as security against repudiation of national debt, 384–385.
Frankfurter, Felix, *Mr. Justice Holmes and the Constitution*, 88; and Greene, Nathan, *The Labor Injunction*, 452; and Katz, W. G., *Cases and Other Authorities on Federal Jurisdiction*, 524; and Landis, J. M., *The Business of the Supreme Court*, 544.
Franklin, Benjamin, 19, 24; in constitutional convention of 1787, 41, 44, 50, 52, 64, 66; as postmaster-general, 465 *n*.
Fraud orders, 466.
Frazier-Lemke bankruptcy amendment (1934), 472.
Frederic, K. A., *An Introductory Study of the Reorganization of the Federal Government*, 238.
Free silver controversy, 388–389.
Freeman, Edward, *History of Federal Government from the Foundation of the Achaean League to the Disruption of the United States*, 15 *n*.
Freund, Ernst, *The Police Power, Public Policy and Constitutional Rights*, 489; *Standards of American Legislation*, 524.
Friedrich, Carl J., and others, *Problems of the American Public Service*, 211.
Fuller, H. B., *The Speakers of the House*, 334.

Gallagher, J. S., *The Government of Washington*, 506.
Gallatin, Albert, secretary of the treasury, 227.
Ganoe, W. A., *History of the United States Army*, 463.
Garfield, James A., candidate for the presidency, 173; assassinated by an office-seeker, 189.
Garner, James W., *American Foreign Policies*, 211; *Political Science and Government*, 561.
Gavit, B. C., *The Commerce Clause of the United States Constitution*, 433.
Gavit, J. P., *Americans by Choice*, 105.
General accounting office, federal, 367, 374.
George, William H. *See* Martin, Charles E.

Gerry, Elbridge, 302; in constitutional convention of 1787, 42, 46.
Gerrymandering, 302.
Gerstenberg, C. W., *Constitutional Law*, 72; *Financial Organization and Management of Business*, 434.
Gettell, R. G., *The History of American Political Thought*, 39, 561; *Political Science*, 561.
Gettys, Luella, *The Law of Citizenship in the United States*, 104.
Gibbon, Edward, quoted, 213.
Gibbons *v.* Ogden, 410 *n*, 529 *n*.
Gladstone, William E., quoted, 29.
Glenn, G., *The Army and the Law*, 463.
Goebel, Julius, *The Recognition Policy of the United States*, 193 *n*, 211.
Gold Clause Cases (1935): Norman *v.* B. & O. R. R., Nortz *v.* United States, and Perry *v.* United States, 531 *n*.
Gold standard, act of 1900, 389; abandonment of (1933), 389.
Gompers, Samuel, *American Labor and the War*, 464.
Goodnow, Frank J., *Social Reform and the Constitution*, 489.
Gorham, Nathaniel, in constitutional convention of 1787, 42.
Gosnell, H. F., *Getting Out the Vote*, 121; *Boss Platt and His New York Machine*, 155. *See also* Merriam, Charles E.
Government, definition of, 1; scope of, 1–2; purposes of studying, 2–10; obstacles to impartial study, 6–7; methods of studying, 10–12; American, background and beginnings of, 14–26; American philosophy of, 545–561.
Government printing office, 250–251.
Governor, colonial, 20–21; office of, in original state constitutions, 32.
Graham, E. L., and Harris, F. W., *Patents, Trade-Marks and Copyrights*, 476.
Grand jury, 519–520.
Grandfather clause, 110–111.
Grants-in-aid, federal, under social security act, 445; system of, 474–475.
Gray, J. C., *The Nature and Sources of Law*, 524.
Green, W. R., *The Theory and Practice of Modern Taxation*, 368.
"Greenbacks," as legal tender, 390.
Greene, Evarts B., *The Provincial Governor in the English Colonies of North America*, 27; *Provincial America, 1690–1740*, 27; *Foundations of American Nationality*, 27.
Greene, Nathan. *See* Frankfurter, Felix.
Greenwood, E., *Some Facts about Government in Business*, 451.
Greer, Sarah, *A Bibliography of Civil Service and Personnel Administration*, 211; *A Bibliography of Public Administration*, 239.
Gregory, T. E., *The Gold Standard and Its Future*, 408.
Griffith, E. C., *The Rise and Development of the Gerrymander*, 302 *n*.
Groves, H. M., *A Tax Policy for the United States*, 368.
Guam, acquisition of, 491; government of, 501.
Guest, H. W., *Public Expenditure*, 386.
Guffey coal act (1935), 442.
Guggenheim, H. F., *The United States and Cuba*, 501 *n*.
Guide to Historical Literature, 26.
Guinn *v.* United States, 111 *n*.
Gulick, C. A. *See* Seager, H. R.

Hacker, L. M., *A Short History of the New Deal*, 260, 452.
Haines, C. G., *The American Doctrine of Judicial Supremacy*, 67 *n*, 544; and Dimock, M. E., and others, *Essays on the Law and Practice of Governmental Administration*, 238.
Haines, Lynn, *Your Servants in the Senate*, 277.
Hall, F. P., *Government and Business*, 259, 451.
Hall, J. P., *Cases on Constitutional Law*, 73, 411 *n*.
Halloran, M. F., *The Romance of the Merit System*, 211.
Hamilton, Alexander, at the Annapolis convention, 38; in constitutional convention of 1787, 41, 43, 44–45; on campaign of education, 55–56; on electoral mechanism, 158–159; on veto power, 201–202; as secretary of the treasury, 224; on impeachments, 287; on powers of constitution, 341; part in funding national debt, 382; on establishment of a mint, 388; establishes first national bank, 392; on commerce, 409; on courts, 507; on need of federal courts, 508–509; *Report on Manufactures*, 415.
Hammer *v.* Dagenhart, 412 *n*.
Handy, A., *Inheritance and Other Like Taxes*, 368.

Haney, L. H., *A Congressional History of Railways to 1850, 1850–1887*, 433; *Business Organization and Combination*, 451.
Harding, A. L., *The Double Taxation of Property and Income*, 368.
Harding, Warren G., 82; approves budget and accounting act of 1921, 373; appoints special commission on independence issue in Philippines, 498.
Harding, W. P. G., *The Formative Period of the Federal Reserve System*, 408.
Hardy, C. O., *Tax-Exempt Securities and the Surtax*, 368.
Hare, J. I. C., *American Constitutional Law*, 72.
Harlow, Ralph V., *Growth of the United States*, 505.
Harris, F. W. *See* Graham, E. L.
Harris, J. P., *Registration of Voters in the United States*, 121; *Election Administration in the United States*, 121.
Harrison, Benjamin, *This Country of Ours*, 184 *n*, 210.
Harrison, Governor-General, on independence of the Philippines, 498.
Hart, A. B., *Salmon Portland Chase*, 544; *American Ideals Historically Traced*, 560.
Hart, James, *Tenure of Office under the Constitution*, 191 *n*, 211; *The Ordinance-Making Powers of the President of the United States*, 211.
Hasbrouck, P. D., *Party Government in the House of Representatives*, 312, 334.
Haskin, Frederic J., *The American Government Today*, 468 *n*.
Haver *v.* Yaker, 283 *n*.
Hawaii, government of, 94, 494–495; status of citizens in, 492–493; delegates to Congress, 494–495.
Hawke *v.* Smith, 85 *n*.
Haworth, P. L., *The Hayes-Tilden Disputed Presidential Election of 1876*, 162 *n*.
Hayden, Ralston, *The Senate and Treaties, 1789–1817*, 295.
Hayes, Rutherford B., elected President in 1876, 161–162, 535.
Hayes-Tilden controversy, 161–162.
Haynes, F. E., *Third Party Movements since the Civil War*, 138; *Social Politics in the United States*, 138.
Haynes, George H., *The Election of Senators*, 265 *n*, 277.
Heald *v.* The District of Columbia, 362 *n*.
Helderman, L. C., *National and State Banks*, 408.
Henderson, G. C., *The Federal Trade Commission*, 259, 451.
Hendricks, H. G., *The Federal Debt, 1919–1930*, 386.
Henry, Patrick, quoted, 28.
Hepburn, A. B., *A History of Currency in the United States*, 408.
Hepburn act (1906), 421 *n*.
Hepburn *v.* Griswold, 538 *n*.
Herodotus, quoted, 465.
Herring, E. P., *Group Representation before Congress*, 154, 334.
Hicks, John D., *The Populist Revolt*, 138.
Hill, J. P., *The Federal Executive*, 210, 211.
Hinds, Asher C., *Precedents of the House of Representatives of the United States*, 315 *n*.
Hines, Walker D., *The Interstate Commerce Commission*, 259.
Hinsdale, B. A., *The Old Northwest*, 36 *n*.
Hinsdale, M. L., *History of the President's Cabinet*, 238.
Hoar, George F., *Autobiography of Seventy Years*, 277.
Holcombe, A. N., *State Government in the United States*, 33 *n*; *The Political Parties of Today*, 139; *New Party Politics*, 139; *The Foundations of the Modern Commonwealth*, 561.
Holdsworth, J. T., *The First Bank of the United States*, 392 *n*.
Holmes, O. W., *The Common Law*, 524.
Holt, W. S., *The Federal Farm Loan Bureau*, 408; *The Federal Trade Commission*, 451.
Home owners' loan corporation, 406.
Homer, *Iliad*, 4.
Hoover, Herbert C., election of, as President in 1928, 129; vetoed independence measure for Philippines, 498; *The Challenge to Liberty*, 476, 489, 561.
Horwill, H. W., *Usages of the American Constitution*, 88.
Hourwich, I. A., *Immigration and Labor*, 433.
House calendar, 331.
House of Commons, cabinet's strict responsibility to, 237–238; customs of, compared with House of Representatives, 333–334.

House Manual and Digest, 334.
Houston, David F., *Critical Study of Nullification in South Carolina*, 337 *n.*
Houston *v.* Moore, 509 *n.*
Howe, Fred C., *The Confessions of a Reformer*, 154.
Howell, Roger, *The Privileges and Immunities of State Citizenship*, 105.
Hubbard, Joseph B., and others, *Current Economic Policies*, 451.
Hughan, J. W., *American Socialism of the Present Day*, 138.
Hughes, Charles E., *The Supreme Court of the United States*, 544.
Hume, David, quoted, 545.
Humphrey, E. F., *Nationalism and Religion in America*, 39.
Humphreys, West H., impeachment of, 290 *n.*
Hunt, Gaillard, *The Department of State of the United States, Its History and Functions*, 224 *n*, 238; and Scott, James Brown, *Debates in the Federal Convention of 1787*, 59.
Hunt, Leigh, quoted, 409.
Hunter, M. H., *Outlines of Public Finance*, 368.
Hylton *v.* United States, 358 *n.*

Ickes, H. L., *Back to Work: The Story of PWA*, 260.
Immigration, under department of labor, 233; restriction of, 418–420; laws, how administered, 419; law of 1924, 418; control of Congress over, 418–419; limitation on Filipinos, 419; Mexican, problem of, 419; national origins provision, 418–419.
Impeachment, power of House in, 289; origin and procedure, 286–291; power of Senate over, 286–291; grounds for, 288–289; penalties, 289; of President, 289–290; instances of, 290.
Implied powers, of Congress, under the constitution, 77–78, 341–342.
Incomes, power of Congress to levy taxes on, 358–359.
Income Tax Case (1894), 531.
Industry, regulation of, by Congress, 435–446; distinguished from commerce, 435.
In re Debs, 207 *n.*
Institute of Government Research, *Service Monographs of the United States*, 239, 259; *The Customs Service*, 368; *The Bureau of Internal Revenue*, 368.
Insular Cases (1900), 493.
Insular possessions, of the United States, 491–493.
Insurance, unemployment, under social security act, 444–445.
Interior, federal department of the, 231–232.
Intermediate credit banks, 405.
International Labor Office, *Social and Economic Reconstruction in the United States*, 452.
Interstate commerce, control of states over, 413–414; methods of regulating, 420.
Interstate commerce commission, organization, 242–243; functions, 242, 420–421; power to regulate rates, service, and safety, 421; rulings, appeals from, 422–423.
Irwin, I. H., *The Story of the Woman's Party*, 121.

Jacks, Lawrence P., *Constructive Citizenship*, 105.
Jackson, Andrew, effect of election as President on political parties, 127; inaugurates spoils system, 188; use of veto power, 203; attitude toward national banks, 395.
Jacobson, J. M., *The Development of American Political Thought: A Documentary History*, 561.
Jameson, J. F., *The American Revolution Considered as a Social Movement*, 16 *n*, 27; *Essays in the Constitutional History of the United States in Its Formative Period, 1775–1789*, 59.
Jay, John, first chief justice of the Supreme Court, 528.
Jefferson, Thomas, on separation of powers, 65; relation of, to political parties, 125–126; election of, as President, 160; on powers of Congress, 314; on powers under constitution, 341; quoted, 533; on American principles of government, 560.
Jenks, J. W., *Principles of Politics*, 306 *n;* and Clark, W. E., *The Trust Problem*, 451.
Jenks, L. H., *The Future of Party Government*, 139.
Jensen, J. P., *Problems of Public Finance*, 368.
Jernegan, M. W., *The American Colonies, 1492–1750*, 27.
Johnsen, J. E. (comp.), *Collective Bargaining*, 449 *n; Old Age Pensions*, 452; *Selected Articles on National Defense*, 464.

Johnson, Andrew, and the tenure of office act, 191; use of veto power, 203; impeachment of, 290–291.
Johnson, C. O., *Government in the United States*, 12.
Johnson, William Samuel, Connecticut delegate at constitutional convention of 1787, 50 *n.*
Joint stock land banks, 405.
Jones act (1916), 497–498.
Jones, C. L., *Statute Law-Making in the United States*, 524.
Jones, Eliot, *Principles of Railway Transportation*, 433; *The Trust Problem in the United States*, 451.
Jones, J. Catron, and Vandenbosch, A., *Readings in Citizenship*, 12–13.
Jones *v.* United States, 492 *n.*
Jotham, parable of, 104.
Judges, federal, appointment and removal of, 542.
Judiciary act of 1789, 519.
Judiciary, colonial, 22; doctrine of supremacy of, in the constitution, 67–69; in England, 67; in France, 67; necessity for, in government, 507–509; sphere of, 510–515; law and equity administered by, 515–519; procedure of, 519–524; of Puerto Rico, 496. *See also* Federal Courts, Supreme Court.
Judson, F. N., *The Law of Interstate Commerce and Its Federal Regulation*, 433; *The Judiciary and the People*, 544.
Juilliard *v.* Greenman, 391 *n.*
Jury, grand, 519–520; trial, 520–523.
Justice, federal department of, 229–230.

Kalaw, M. M. *See* Malcolm, G. A.
Kansas Legislative Council, *Old Age Pensions*, 452; *The Social Security Program*, 452.
Katz, W. G. *See* Frankfurter, Felix.
Keezer, D. M., and May, S., *The Public Control of Business*, 259, 451.
Kelly, Clyde, *United States Postal Policy*, 476.
Kemmerer, E. W., *The ABC of the Federal Reserve System*, 408; *Postal Savings*, 476.
Kendall *v.* United States, 176 *n.*
Kent, Frank R., *The Democratic Party: A History*, 129 *n*, 138; *The Great Game of Politics*, 154; *Political Behavior*, 154.
Kerr, C. H., *The Origin and Development of the United States Senate*, 277.
Kile, O. M., *The Farm Bureau Movement*, 154.
King, Clyde L., *Public Finance*, 368.
King, Rufus, in constitutional convention of 1787, 42, 46.
Kirsh, H. S., and Shapiro, H. R., *The National Industrial Recovery Act*, 260.
Know-Nothing party, 131.
Knox *v.* Lee, 538 *n.*
Kuykendall, Ralph S., *History of Hawaii*, 505.

Labor, federal department of, 233–234; relation of national government to, 448–450.
La Follette, Robert M., *Autobiography*, 154, 277.
La Follette seamen's act (1915), 431 *n.*
Landis, B. Y., *Must the Nation Plan?* 451.
Landis, J. M. *See* Frankfurter, Felix.
Langeluttig, A., *The Department of Justice of the United States*, 238.
Lanni, C. G., *Traveling on the Democratic Donkey*, 154.
Larabee, L. W., *Royal Government in America: A Study of the British Colonial System before 1783*, 27.
Laughlin, J. L., *History of Bimetallism in the United States*, 389 *n*; *The Federal Reserve Act: Its Origin and Problems*, 408.
Laurel, J. P., *Local Government in the Philippine Islands*, 506.
Law, martial, 425–426; military, 459; of the United States, 515–523.
Lawrence, David, *The Other Side of Government*, 238; *Beyond the New Deal*, 260.
Lawrence, J. S., *Banking Concentration in the United States*, 408.
Lawrence, William, *Henry Cabot Lodge*, 155.
Lawson, James F., *The General Welfare Clause*, 336 *n*, 354 *n.*
Lay, Tracy H., *The Foreign Service of the United States*, 211.
League of Nations, covenant of the, as an issue between political parties, 129.
Learned, H. B., *The President's Cabinet*, 238.
"Leave to print," 310.
Lecky, W. E. H., *History of England in the Eighteenth Century*, 26.
Lees-Smith, H. B., *Second Chambers in Theory and Practice*, 277.

Legal tender issue, 390–391; Cases, 391 *n.*
Legislation, powers of the President in connection with, 181–183; delegation of powers in, 486–487.
Legislatures, colonial, 21–22. *See also* Congress.
Leisy *v.* Hardin (Original Package Decision), 414 *n.*
Letters of marque and reprisal, 454.
Lewinson, Paul, *Race, Class and Party: A History of Negro Suffrage and White Politics in the South*, 121.
Lewis, Stuart, *Readings in Party Principles and Practical Politics*, 139.
Libby, O. G., *The Geographical Distribution of the Vote of the Thirteen States on the Constitution in 1787–88*, 57 *n.*
Library of Congress, 250; *List of Books on the Government and Administration of the United States*, 13; *Recent Books on American Government and Politics*, 13.
Lief, Alfred (editor), *The Dissenting Opinions of Mr. Justice Holmes*, 537 *n*, 544.
Lien, Arnold J., *Privileges and Immunities of Citizens of the United States*, 91 *n*, 105, 489; and Fainsod, Merle, *The American People and Their Governmeni*, 12.
Limitations, constitutional, theory of, 70; on the states, under the constitution, 336–340; on the powers of Congress, 477–488.
Littler, Robert M. C., *The Governance of Hawaii*, 505.
Livy, quoted, 387.
Lobbying, articles on, in *Annals of the American Academy of Political and Social Science*, 334.
Local government, history of, in the colonies, 22–23; in New England, 22; in the South, 23.
Lodge, Henry Cabot, *The Senate of the United States*, 277, 292 *n.*
Long, Breckinridge, *The Genesis of the Constitution of the United States*, 59.
Loughran, P. H., *Judicial Review of Federal Executive Action*, 544.
Louisiana Purchase, 490, 492.
Love, R. A., *Federal Financing*, 386.
Lowell, A. Lawrence, *The Government of England*, 7 *n; Public Opinion and Popular Government*, 136 *n.*
Lowell, James Russell, quoted, 89.
Luce, Robert, *Legislative Procedure*, 295, 334; *Congress: An Explanation*, 312; *Legislative Assemblies*, 312, 334; *Legislative Principles*, 334, 524; *Legislative Problems*, 334.
Luther *v.* Borden, 533 *n.*
Lutz, H. L., *Public Finance*, 368.
Lynch, D. T., *Grover Cleveland*, 212.
Lyon, Leverett S., and others, *The National Recovery Administration, An Analysis and an Appraisal*, 260, 451.

McBain, H. L., *The Living Constitution*, 88, 537 *n*, 544.
McCall, S. W., *The Business of Congress*, 310 *n*, 334.
McCombs, William F., *Making Woodrow Wilson President*, 155.
McConachie, L. G., *Congressional Committees*, 334.
McCown, A. C., *The Congressional Conference Committee*, 295, 334.
McCray *v.* United States, 413 *n.*
McCulloch, A. J., *Suffrage and Its Problems*, 120.
McCulloch *v.* Maryland, 339 *n*, 342 *n*, 351, 360, 393–394, 529 *n.*
McElroy, Robert M., *Grover Cleveland*, 212.
McGehee, L. P., *Due Process of Law under the Federal Constitution*, 481 *n.*
McGovney, D. O., *Cases on Constitutional Law*, 73.
McGrain *v.* Daugherty, 335 *n.*
McIlwain, C. H., *The American Revolution: A Constitutional Interpretation*, 27.
McKinley, A. E., *The Suffrage Franchise in the Thirteen English Colonies*, 21 *n.*
McLaughlin, Andrew C., *The Confederation and the Constitution*, 38; *Constitutional History of the United States*, 38, 59, 88; *Foundations of American Constitutionalism*, 72; *The Courts, the Constitution and Parties*, 88, 544.
Macaulay, quoted, 240.
MacDonagh, Michael, *The Speaker of the House*, 316 *n.*
Macdonald, Austin F., *Federal Aid*, 468 *n*, 476.
MacDonald, William, *Documentary Source Book of American History, 1606–1926*, 27; *Select Charters and Other Documents Illustrative of American History, 1606–1775*, 27; *Select Documents Illustrative of the*

History of the United States, 1776–1861, 30 *n*; *A New Constitution for a New America*, 88; *The Menace of Recovery*, 451.
Machiavelli, quoted, 349.
MacKay, R. A., *The Unreformed Senate of Canada*, 277.
Maclay, E. S., *History of the United States Navy from 1775 to 1902*, 464.
Macy, C. W. *See* Fagan, Elmer D.
Macy, Jesse, *Political Parties in the United States*, 138.
Madison, James, at the Annapolis convention, 37; at the constitutional convention, 41, 45–46; on campaign of education, 55–56; on separation of powers, 65; on political parties, 122–123; on the Senate, 275; on popular representation, 296 *n*; on prolific lawmaking, 349; establishes second national bank, 392; on national defense, 453; on federal courts, 509; *Debates in the Federal Convention*, 41 *n*; *Journal*, 46 *n*, 48.
Magee, J. D., and others, *The National Recovery Program*, 260, 451.
Magna Carta, 17, 71, 480 *n*.
Mahon, Lord, quoted, 490.
Malcolm, G. A., *The Constitutional Law of the Philippine Islands*, 506; and Kalaw, M. M., *Philippine Government*, 506.
Mandatory and permissive powers, of Congress, under the constitution, 342–343.
Mann-Elkins act (1910), 421 *n*.
Marbury *v.* Madison, 69 *n*, 529 *n*.
Marriott, J. A. R., *Second Chambers*, 277.
Marshall, John, on implied powers, 339, 341–342; on the taxing power, 351, 393–394; in McCulloch *v.* Maryland, 351; on regulation of commerce, 410; as Chief Justice, 528–530; Lord Bryce's estimate of, 530; *Life of*, by Albert J. Beveridge, 394 *n*.
Martial law, limitations on, 459–460.
Martin, Charles E., *The Policy of the United States as Regards Intervention*, 211; and George, William H., *American Government and Citizenship*, 12.
Martin, Luther, in constitutional convention of 1787, 42, 46, 393.
Mason, E. C., *The Veto Power*, 204 *n*, 211.
Mason, George, in constitutional convention of 1787, 46.
Mathews, John M., *The American Constitutional System*, 72, 481 *n*, 522 *n*; *American Foreign Relations: Conduct and Policies*, 194 *n*, 211, 224 *n*, 294; and Berdahl, C. A., *Documents and Readings in American Government*, 12.
Maxey, C. C., *The American Problem of Government*, 12.
Maxson, Charles H., *Citizenship*, 104.
May, S. *See* Keezer, D. M.
Mayers, Lewis, *The Federal Service*, 190 *n*, 211, 259.
Means, G. C. *See* Bonbright, J. C.
Meigs, W. M., *The Growth of the Constitution in the Federal Convention of 1787*, 59; *The Relation of the Judiciary to the Constitution*, 88, 544; and Calvert, Thomas H., *The Constitution and the Courts*, 72.
Merchant marine, 431.
Merriam, Charles E., *History of American Political Theories*, 39; *The Written Constitution and the Unwritten Attitude*, 88; *Civic Training in the United States*, 105; on political parties, 122; *American Political Ideas*, 561; *New Aspects of Politics*, 561; *Political Power*, 561; and Gosnell, H. F., *Non-Voting: Causes and Methods of Control*, 119 *n*, 121; *The American Party System*, 139.
Metcalf, H. C. *See* Tead, O.
Metcalf *v.* Mitchell, 361 *n*.
Michels, R., *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, 136 *n*, 139.
Miles *v.* Graham, 359 *n*.
Military government, 460–461.
Military law, limitations on, 459.
Militia, power of President over, 206; control of Congress over, 461–462.
Mill, John Stuart, quoted, 435.
Miller, H. H., *Principles of Economics Applied to the Philippines*, 506.
Mills, M. C., and Starr, G. W., *Readings in Public Finance and Taxation*, 368.
Minor, Henry A., *The Story of the Democratic Party*, 138.
Minor *v.* Happersett, 100 *n*.
Mixer, K., *Porto Rico*, 505.
Moncado, H. C., *America, the Philippines and the Orient*, 506.
Monroe, James, reëlection of, as President in 1820, 126; on post roads, 468.
Montesquieu, Charles le Secondat,

Baron, on the separation of powers, 64–65; *The Spirit of Laws*, 65 *n.*
Moore, B. F., *The Supreme Court and Unconstitutional Legislation*, 489, 544.
Moran, T. F., *American Presidents*, 180.
Morey, William C., quoted, 28.
Morganston, C. E., *The Appointing and Removal Power of the President of the United States*, 211.
Morison, S. E., *Sources and Documents Illustrating the American Revolution, 1764–1788 and the Formation of the Federal Constitution*, 39.
Morris, Gouverneur, in constitutional convention of 1787, 42, 46, 49, 51.
Morris, Robert, 31; in constitutional convention of 1787, 42, 43.
Morse, A. D., *Parties and Party Leaders*, 139.
Motor transport, interstate, regulation of, 427.
Mott, Rodney L., *Due Process of Law*, 481 *n*, 489.
Moulton, H. G., and Pasvolsky, Leo, *War Debts and World Prosperity*, 386.
Munro, William B., *The Makers of the Unwritten Constitution*, 62 *n*, 88, 476, 529 *n; Personality in Politics*, 154; *The Governments of Europe*, 237 *n*, 277.
Musmanno, M. A., *Proposed Amendments to the Constitution*, 88.
Muzzey, David S., *The United States of America*, 505.
Myers, W. S., *The American Government of Today*, 12; *The Republican Party: A History*, 129 *n*, 138.
Myers *v.* Anderson, 111 *n.*
Myers *v.* United States, 183 *n*, 184 *n*, 191.

National bankruptcy act, 471.
National defense, powers of Congress over, 453–463.
National Industrial Conference Board, *The Federal Fiscal Emergency*, 386; *Mergers and the Law*, 451; *Public Regulation of Competitive Practices*, 451; *The World War Veterans and the National Treasury*, 464.
National industrial recovery act (1933), 254–255, 439–442; codes of fair competition under, 440; unconstitutionality of, 442; collective bargaining in, 448–449.
National labor relations board, 234, 449.
National recovery administration, 254–255, 439–442.
National youth administration, 258.
Nationalism, American, emergence of, 28–38.
Naturalization, citizenship by, 93–97; procedure for acquiring, 94–96; by statute or treaty, 93–94; by judicial process, 94–96; strictness of laws relating to, 96–97; under control of department of labor, 233; power of Congress over, 471.
Navy, federal department of the, 228–229; power of Congress to provide and maintain, 458–459.
Neely *v.* Henkel, 533 *n.*
Negro, suffrage, 108–112.
Neutrality act (1935), 456–457.
Nevins, Allan, *The American States during and after the Revolution, 1775–1789*, 38; *Grover Cleveland*, 154, 212.
Newberry *v.* United States, 266 *n.*
New England, local government in, 22; confederation of 1643, 23. *See also* Colonies.
New York State, requirement of literacy tests for voting in, 115.
Nichols, Philip, *The Law of Eminent Domain*, 489.
Nixon *v.* Condon, 111 *n.*
Nixon *v.* Herndon, 111 *n.*
Noel, F. R., *A History of the Bankruptcy Clause in the Constitution of the United States*, 476.
Nomination, procedure and development, 145–146, 163–168, 590–593; by caucus, 144–145; in conventions, 145–146; of presidential electors, 163–168; of candidates for the presidency, 170–173; of congressmen, 303.
Northern Securities Co. *v.* U. S., 436 *n.*
Northwest Ordinance, the, 36, 492.
Northwest Territory, acquisition of, 490.
Nullification and secession, 337–338.

Oatman, M. E. *See* Blachly, F. F.
Odegard, Peter, *The American Public Mind*, 154; *Pressure Politics*, 154, 334.
Offutt, Milton, *The Protection of Citizens Abroad by the Armed Forces of the United States*, 105.
Ogburn, W. F., and others, *Social Change and the New Deal*, 259.

Ogg, F. A., and Ray, P. O., *Introduction to American Government*, 12.
Ohio Oil Co. *v.* Indiana, 483 *n.*
Olcott, C. S., *Life of William McKinley*, 212.
Old age pensions, 443–444.
Oleomargarine case, 412.
Oneal, J., *American Communism*, 139.
"Open market committee," under federal reserve banking system, 398.
Oregon boundary treaty, 282 *n.*
Orth, S. P., and Cushman, R. E., *American National Government*, 12, 72, 129 *n*, 433.
Osgood, H. L., *The American Colonies in the Seventeenth Century*, 27; *The American Colonies in the Eighteenth Century*, 27.
Ostrogorski, M., *Democracy and the Organization of Political Parties*, 138.
Overacker, Louise, *The Presidential Primary*, 164 *n*, 179.

Page, T. W., *Making the Tariff in the United States*, 433.
Panama Canal Zone, 491, 501.
Pardons, power of granting, by President, 192–193.
Parrington, Vernon L., *The Colonial Mind, 1620–1800*, 39.
Parties, political, machinery and work of, 82–83; history and functions, 122–138; inevitable in free government, 122–123; beginnings of, 124–125; in constitutional convention, 124; effect of Civil War on strength of, 128; recent developments, 128–130; psychology of, 132; not recognized in constitution, 132; the party system, 133–137; third parties, causes of, 137–138; two-party system, advantages of, 137; national, organization and methods of, 140–154; definition, 140; varied elements of, 141–143; need for organization, 144; early forms of, 144–145; conventions, 145–146; campaign methods, 149–150; finance, 151–152; relation to system of government, 152; non-partisan organization, 153; influence in the Senate, 273.
Pasvolsky, L., *Current Monetary Issues*, 408. *See also* Moulton, H. G.
Patents, power of Congress over, 469–470.
Paterson plan, 49.
Paterson, William, in constitutional convention of 1787, 42, 46.
Patterson, C. P., *American Government*, 12.
Pearson, F. A. *See* Warren, G. F.
Peck, H. W., *Taxation and Welfare*, 368.
Pendleton act, 189.
Penn, William, "Plan for a Union of the Colonies," 24 *n.*
Pennsylvania R. R. Co. *v.* Knight, 414 *n.*
Pepper, G. W., *In the Senate*, 277.
Pepys, Samuel, quoted, 369.
Pergler, Charles, *Judicial Interpretation of International Law in the United States*, 515 *n.*
Persons, W. M., *Government Experimentation in Business*, 260, 451.
Petition of Right (1628), 480.
Phelps, E. M., *Selected Articles on Immigration*, 433.
Philippine independence act of 1934, 498–501.
Philippine Islands, status of citizens in, 94; acquisition of, 491; former government of, 497–498; new Commonwealth of, 498–501; relations of, with the United States, 499–500; delegates to House of Representatives, 500; naval depots and neutralization in, 500.
Phillips, C. A., *Bank Credit*, 408.
Philosophy of government, American, principles of, 545–560.
Pickering, John, impeachment of, 290 *n.*
Pierson, C. W., *Our Changing Constitution*, 88, 476.
Pinckneys, the two, of South Carolina, in constitutional convention of 1787, 42, 46.
Pinckney plan, 49 *n.*
Pipkin, Charles W., *Social Politics and Modern Democracies*, 452.
Pivotal states, influence of, in presidential elections, 171.
Plantation Affairs, Committee for, 19 *n.*
Platt, Thomas C., *Autobiography*, 277.
Plehn, C. C., *Introduction to Public Finance*, 368.
Police power, in relation to due process, 482–483.
Political patronage, 83. *See also* Spoils system.
Polk, James K., President, in connection with the Oregon boundary treaty, 282 *n.*
Pollock, Frederick, *The Expansion of the Common Law*, 524.

Pollock, J. K., Jr., *Party Campaign Funds*, 154.
Pollock *v.* Farmers' Loan and Trust Co., 359 *n*, 360 *n*, 531.
Pomeroy, J. N., *An Introduction to the Constitutional Law of the United States*, 465.
Populist party, 131.
Porter, Kirk H., *History of Suffrage in the United States*, 21 *n*, 120; *National Party Platforms*, 154.
Post-bellum amendments, 86.
Post office, federal department of, 230–231.
Post roads, power of Congress over, 467–468.
Postal power of Congress, 465–468.
Postal savings system, 230, 407, 467.
Postmaster-general, appointment of, 214; head of post office department, 230–231.
Pound, Roscoe, *The Spirit of the Common Law*, 524; "The Place of Judge Story in the Making of American Law," 544.
Presidency, history of, 156–176; succession to, 177–178.
President, functions of, under Articles of Confederation, 31; election of, 81–82, 156–175; term of, 156–157; changes in methods of electing, 157–160; in 1824, 161; by electors, 167; popular vote for, 167; counting of votes, 168; office of, 156–178; need for single executive, 156; methods of choosing, 157–160; in event of tie vote, 158; choice of great men for, 169–170; early careers of, 171; factors determining choice of, 170–172; types of candidates for, 172–173; selection of candidates for, 172–173; personal qualities of candidates for, 173; salary, 176; constitutional immunities of, 176; succession to office, 177–178; constitutional qualifications of, 179; messages, 196–197; their influence on legislation, 197; personality of, 207–209; relations to Congress, 157; relation to cabinet, 213–217; appointments of, 185–187; influence on appropriations, 374–375; source of authority under the constitution, 182–184; powers and functions, 66–67, 181–210; executive, 181–195; in connection with legislation, 181–182, 195–200; judicial, 183; classification of, 184; implied executive powers of, 184–185; of appointment, 185–187; of removal, 190–192; pardons, 192–193; relating to diplomacy, 193–195; relating to Congress, 195–196; in relation to executive orders, 199–200; veto power, 200–205; military, 205–207; in relation to state affairs, 206–207; political powers, 207–209; treaty-making power, 193, 281–286; power of, in relation to independent administrative agencies, 241; relating to tariff, 416–417; over railroads in war time, 424; war powers, 454–463.
President's Research Committee, *Recent Social Trends in the United States*, 433.
Primary, presidential, 174–175.
Privileges and immunities, of citizens, 89–90; of members of Congress, 274.
Privy Council, right of appeal to, from colonial courts, 22, 69.
Progressive party, 131.
Prohibition party, 130.
Public opinion, 24–25.
Public utility holding companies, development of, 428; their merits and defects, 428–429; act of 1935, 429–430.
Public works administration, federal, 256; housing division of, 256; housing corporation of, 256.
Puerto Rico, status of citizens in, 94, 492–493; acquisition of, 491; government of, 495–496.

Qualifications for voting. *See* Suffrage.

Radio broadcasting, regulation of, 244–245.
Railroads, power of the President over, in war time, 424; federal operation of, 424–426; pensions in connection with, 426.
Raleigh, Sir Walter, quoted, 14.
Randolph, Edmund, in constitutional convention of 1787, 42, 46.
Randolph plan, 48.
Rathbun-Humphrey *v.* United States, 192 *n*.
Raushenbush, H. S., and Laidler, W., *Power Control*, 434.
Ray, P. O., *An Introduction to Political Parties and Practical Politics*, 121, 139, 148 *n*, 179. *See also* Ogg, F. A.
Reconstruction finance corporation, organization and functions, 252–253.

Reed, Thomas B., in reference to quorum of the House, 318–319.
Remick, H. C., *The Powers of Congress in Respect to Membership and Elections*, 334, 350.
Removals from office, by the President, 191–192.
Representation, basis of, in Congress, 263–264; in House of Representatives, 297; district system of, 301–302.
Representatives, House of, Committee on Labor, *Old Age Pensions; Hearings*, 452.
Representatives, House of, power over treaties, 284–285; originates money bills, 291–292, 376–377; organization, 296–311; "popular branch" of government, 296–297; original conception of, 297; growth in size, 298–299; apportionment of members, 299–300; present size of, compared with House of Commons and Chamber of Deputies, 301; qualifications for membership, 304; compared with English traditions, 304–305; logical functions of a representative, 305; terms of representatives, 306–309; sessions, 307–308; serial numbers of, 308 *n;* debates, 310–311; routine business of, 311; procedure, 313–334; rules, 314–315; speaker, 315–321; committees, 321–325; work of, 327–333; customs of, compared with House of Commons, 333–334.
Republican party, 128–129.
Resettlement administration, 257; division of subsistence homesteads, 257.
Residence requirements, of candidates for Congress, 304–305.
Restraint of trade, 436–437.
Revenue bills, relation of Senate to, 291–292.
Revenues, federal, 1916–1935, chart, 364. *See also* Taxation.
Reynolds, G. G., *The Distribution of Power to Regulate Interstate Carriers between the Nation and the States*, 434.
Rice, Stuart A., *Farmers and Workers in American Politics*, 138.
Roberts, G. B., *The Functions of an English Second Chamber*, 277.
Robinson, E. E., *Evolution of American Political Parties*, 138.
Robinson, W. A., *Thomas B. Reed, Parliamentarian*, 334.
Rogers act (1924), 223.
Rogers, Lindsay, "The Power of the President to Sign Bills after Congress Has Adjourned," 202 *n; The Postal Power of Congress*, 238, 466 *n*, 476; *The American Senate*, 277, 294; *Crisis Government*, 476, 561. *See also* Willoughby, W. F.
Rogers, Will, on the Senate, 276.
Rohlfing, C. C., *National Regulation of Aeronautics*, 434; and others, *Business and Government*, 451.
Roosevelt, Franklin D., nomination of, as President in 1932, 166; legislative activity of, 198; special session of Congress called by, 308; on surtaxes, 353 *n;* on need of industrial and social security, 442–443; on soldiers' bonus, 458; *On Our Way*, 210; *Looking Forward*, 561.
Roosevelt, Nicholas, *The Philippines*, 506.
Roosevelt, Theodore, on the presidency, 181, 183; reference to James Madison, 46 *n;* prosecution of trusts, 436–437; *Autobiography*, 154, 184 *n; The New Nationalism*, 336 *n*.
Roosevelt, Theodore, Jr., *Average Americans*, 101 *n*.
Root, Elihu, *Addresses on Government and Citizenship*, 105.
Roper, D. C., *The United States Post Office*, 239, 476.
Rose, J. C., *Jurisdiction and Practice of the Federal Courts*, 524.
Rosen, S. McKee, *Political Process*, 154.
Rowe, D. N. *See* Eriksson, E. M.
Rowe, L. S., *The United States and Porto Rico*, 505.
Rubinow, I. M., *The Quest for Security*, 451.
Russell, E. B., *The Review of American Colonial Legislation by the King in Council*, 21 *n*, 27.
Rutledge, John, in constitutional convention of 1787, 42.

St. Louis & O'Fallon Railroad Company *v.* United States, 423 *n*.
Sainte-Beuve, quoted, 549.
Sait, E. M., *American Parties and Elections*, 121, 139, 179.
Samoan Islands, acquisition and government of, 491, 501.
Samonte, V. J., *The American System of Colonial Administration*, 505.
Sanders, J. B., *Evolution of Executive Departments of the Continental Congress, 1774–1789*, 31 *n*.

Schechter Poultry Corporation *v.* United States, 78 *n*, 199, 340, 411, 531 *n*, 441–442, 486, 488.
Schenk *v.* United States, 463 *n*.
Schmeckebier, L. F., *New Federal Organizations*, 259, 408, 451, 476; *The Federal Radio Commission*, 434; *The District of Columbia: Its Government and Administration*, 506; and Willoughby, W. F., *The Government and Administration of the District of Columbia: Suggestions for Change*, 506.
Scholey *v.* Rew, 358 *n*.
Schouler, James, *Ideals of the Republic*, 105.
Schulz, G. J., *Election of the President of the United States by the House of Representatives*, 179.
Schuyler, R. L., *The Constitution of the United States: an Historical Survey of Its Formation*, 59.
Scott, James Brown, *Sovereign States and Suits*, 544; *The Judicial Settlement of Controversies between States of the American Union*, 544. *See also* Hunt, Gaillard.
Scott, W. A., *The Repudiation of State Debts*, 384 *n*.
Seager, H. R., and Gulick C. A., *Trust and Corporation Problems*, 434.
Sears, Louis M., *A History of American Foreign Relations*, 211.
Secession and nullification, 337–338.
Securities and exchange commission, 245–246.
Seeley, Sir J. R., quoted, 490.
Selective service law, 455.
Seligman, E. R. A., *Essays in Taxation*, 368; *The Shifting and Incidence of Taxation*, 368; *The Income Tax*, 368; *The Economics of Farm Relief*, 408, 452.
Senate Committee on Territories and Insular Affairs, hearings, *Independence for the Philippine Islands*, 506.
Senate, confirmation of presidential appointments, 186–187; organization and procedure, 261–277; original conception of, 264, 278; qualifications for election to, 265–266; vacancies in, 266–267; equality of representation in, 267–268; sessions, 269; procedure, 269–274; committees, 270–272; debates, 272–273; caucus in, 273–274; place in American history, 275–276; future of, 276–277; legislative functions, 278, 291–292; special functions, 279–294; confirmation of appointments, 279–281; in connection with treaties, 281–286; powers, 286–292; to try impeachments, 286–291; in relation to money bills, 291–292; legislative powers coördinate with House, 292; on investigations, 293; appropriation bills in, 377.
Senate Manual, 277, 295.
Senatorial courtesy, 187, 279–280.
Senators, election of, by state legislatures, 86; methods of choosing, 264–269; direct popular election of, 265–267; privileges and immunities of, 274.
Separation of powers, in original state constitutions, 32; in constitution, 64–67; Montesquieu's views on, 64–65; Blackstone's endorsement of, 65; in England, 67.
Service Monographs of the United States. *See* Institute of Government Research.
Sharfman, I. L., *The Interstate Commerce Commission*, 259.
Shays Rebellion, 1786, 36.
Sherman anti-trust act of 1890, 435–437; merits and defects of, 437.
Sherman, John, as secretary of the treasury, 227; *Recollections of Forty Years*, 277.
Sherman, Roger, in constitutional convention of 1787, 42, 43, 46.
Shipping board, 431.
Shoemaker, W. D., *Trade-Marks*, 470 *n*.
Short, O. C., *The Merit System*, 211.
Shortt, L. M., *The Development of National Administrative Organization in the United States*, 238.
Shotwell, James T., *War as an Instrument of National Policy*, 464.
Shuler, G., *Party Control in Politics and Government*, 139.
Shuler, N. R. *See* Catt, C. C.
Shultz, William J., *American Public Finance and Taxation*, 368.
Sikes, E. R., *State and Federal Corrupt Practices Legislation*, 154.
Silver, coinage of, in nineteenth century, 388–389; silver purchase act (1934), 390.
Simpson, Alexander, Jr., *A Treatise on Federal Impeachments*, 295.
Slaughter House Cases, 102 *n*.
Small, N. J., *Some Presidential Interpretations of the Presidency*, 210.
Smith, Adam, *The Wealth of Nations*, 352 *n*.
Smith, D. H., *The Bureau of Naturali-*

zation, 105; *The United States Civil Service Commission*, 211; *The General Accounting Office*, 386.
Smith, G. H. E., and Beard, Charles A., *The Recovery Program*, 260. *See also* Beard, Charles A.
Smith, H. A., *The American Supreme Court as an International Tribunal*, 544.
Smith, J. Allen, *The Growth and Decadence of Constitutional Government*, 561.
Smith, Ralph W., *Weights and Measures Administration*, 476.
Smith, T. C., *Life and Letters of James Abram Garfield*, 212.
Smith-Hughes act (1917), 474.
Smithsonian Institution, 251.
Smyth, A. H. (editor), *Writings of Benjamin Franklin*, 24 *n.*
Snedden, David, *Civic Education*, 105.
Snow, A. H., *The American Philosophy of Government*, 105, 561.
Social security act (1935), 225; administration of, 234, 246, 443–446; old age pensions under, 443; unemployment insurance, 444–445.
Socialist party, history of, 130–131.
South Carolina, nullification and secession in, 337–338.
South Carolina *v.* United States, 360 *n.*
Sovereignty, of the states, under the constitution, 336; in the national and state governments, 62.
Spahr, Margaret (editor), *Readings in Recent Political Philosophy*, 561.
Spain, treaty with (1898), 496.
Sparks, E. S., *History and Theory of Agricultural Credit in the United States*, 408.
Speaker, of House of Representatives, origin, 315; compared with House of Commons, 316; powers, 317–321; development in America, 316; choice of, 317; methods of addressing, 325–326.
Speech, freedom of, in war time, 462–463.
Spencer, Herbert, quoted, 313, 545.
Spencer, Richard, *The United States Patent Law System*, 476.
Spencer, W. H., *Collective Bargaining under Section 7a of the National Industrial Recovery Act*, 449 *n.*
Spicer, G. W., *The Constitutional Status and Government of Alaska*, 505.
Splawn, W. M. W., *The Consolidation of Railroads*, 434.
Spoils system, in national government, 188–189.
Sprague, O. M. W., *History of the National-Bank Currency*, 408.
Springer *v.* United States, 358 *n.*
Standard Oil Company Case, 437.
Stanhope, Lord, *History of England*, 26.
Stanwood, Edward, *A History of the Presidency*, 126 *n*, 138, 179; *American Tariff Controversies in the Nineteenth Century*, 415 *n*, 433.
Stare decisis, doctrine of, 538–539.
Starr, G. W. *See* Mills, M. C.
State, federal department of, 222–224; secretary, appointment of, 214; in relation to foreign affairs, 222–223; in connection with treaties, 282; *Documentary History of the Constitution*, 59.
States, early constitutions of, 32–33; powers of, under the constitution, 62–64, 336–341; citizens of, 98–99; suffrage in, 297–298; representation in Congress, 298–302; sovereignty of, under the constitution, 336–338; right to secede, 337–338; powers prohibited to, 344–345; taxation of instrumentalities of, by Congress, 360; of national banks, 393–395; debts of, repudiation, 384–385; interstate and foreign commerce, 413–414, 423; suability of, 512–513; common law of, 516.
Statesman's Year Book, 386.
Statutory law, 516–517.
Steel-Maitland, Arthur, *The New America*, 451.
Steering committee, in the Senate, 271–272.
Stein, E., and others, *Labor and the New Deal*, and *Supplement*, 452.
Steiner, Bernard C., *Life of Roger Brooke Taney*, 544.
Stephenson, G. M., *A History of American Immigration, 1820–1924*, 433.
Stephenson, G. T., *Race Distinctions in American Law*, 121, 489.
Stephenson, N. W., *Nelson W. Aldrich*, 155, 277.
Stevens, C. E., *Sources of the Constitution of the United States*, 59.
Stimson, F. J., *The American Constitution as It Protects Private Rights*, 105, 489.
Stock exchanges, regulation of, 245.
Story, Joseph, *Commentaries on the Constitution of the United States*, 72, 288 *n*, 537 *n;* as Associate Justice, 537.

Studenski, Paul, *Chapters in Public Finance*, 368; *Public Borrowing*, 386.
Suffrage, widening of, under English and American constitutions, 74; manhood, 107–108; negro, 108–112; restrictions on, 108; literacy test for, 109–110, 115–116; qualifications for, 109–120; woman suffrage, 113–115; at congressional elections, 297; uniform, 297–298; extension of, 297–298; in Hawaii, 494–495; Puerto Rico, 496; Philippines, 498–499; absence of, in the District of Columbia, 504–505.
Sumner, Helen L., *Equal Suffrage*, 121.
Supreme Court, provision for, in constitution, 68; its power to declare laws unconstitutional, 68–69, 75; interpretation of the constitution by, 77–80; decisions, as to child labor, 412–413; under the Sherman act, 436–437; in the Schechter case, 441–442; in agricultural adjustment act, 447–448; as to control over territories, 492–493; its relation to other federal courts, 525–543; its workings, 525–528; history, 530–539; power of judicial review, 531–536; personnel and philosophy, 536–539.
Supreme Court *Reports*, 526.
Swenson, R. J., *The National Government and Business*, 433.

Taft, William H., on President, 156; *Four Aspects of Civic Duty*, 105; *Our Chief Magistrate and His Powers*, 184 *n*, 201 *n*, 210.
Taney, Roger B., as Chief Justice, 90, 530–531.
Tansill, C. C., *Documents Illustrative of the Formation of the Union of the American States*, 59.
Tariff, as an issue in elections, 128–129; Commission, 247–248, 416–417; the, 414–418; beginnings of, 415; Civil War period, 415; flexible clause in, 416–417; quota system, 417; on exports, 417–418.
Taussig, F. W., *The Silver Situation in the United States*, 389 *n*; *The Tariff History of the United States*, 415 *n*, 433.
Tax Commissioners of Indiana *v.* Jackson, 531 *n*.
Taxation, power of, in the colonies, 21–22; under the constitution, by Congress, 351–367; spread of, 364–365; future of, 365; need for public education in, 365–366.
Taxes, definition, 351; power to levy, importance of, 351; essentials of, 351–352; classification, 353–354; limitations on levy by Congress, 354–360; uniform under constitution, 355; direct, 357, 362–363; on incomes, 358–359; income tax law, of Civil War period, 358; and representation, 362; double, 361–362; war taxes, 362–363; collection of, 367; accounts and audits, 367.
Taylor, H., *Due Process of Law and the Equal Protection of the Laws*, 489.
Tead, O., and Metcalf, H. C., *Labor Relations under the Recovery Act*, 452.
Temperley, H. W. V., *Senates and Upper Chambers*, 277.
Tenny, J. L., *All about Naturalization*, 105.
Tenure of office act, 191.
Territories, government of, not provided for in constitution, 76; government of, 490–505; constitutional status of, 492–493.
Thach, C. C., *The Creation of the Presidency 1775–1789*, 179.
Thayer, J. B., *Cases on Constitutional Law*, 69 *n*, 73; *The Origin and Scope of the American Doctrine of Constitutional Law*, 544.
Thomas, Shipley, *History of the A.E.F.*, 464.
Thompson, Walter, *Federal Centralization*, 350, 476.
Thorpe, F. N., *Federal and State Constitutions, Colonial Charters and Other Organic Laws*, 27.
Thorpe, G. C., *Federal Departmental Organization and Practice*, 238.
Three mile limit, power of Congress, outside of, 472.
Tiedeman, C. G., *The Unwritten Constitution of the United States*, 88.
Tippetts, C. S., *State Banks and the Federal Reserve System*, 408.
Trade-marks, power of Congress over, 470.
Transportation act of 1920, 421 *n*, 424–426.
Treason, 478–479.
Treasury, federal department of the, 224–227.
Treaties, power over, of President, 281–283; of Senate, 282; of House of Representatives, 284–285; and secret diplomacy, 285.
Trenholme, Louise I., *Ratification of the Federal Constitution*, 60.
Trevett *v.* Weeden. 35 *n*, 69.

Trial by jury, constitutional securities for, 520–523.
Trusts, control of, by Congress, 436–437.
Tucker, John R., *Constitution of the United States*, 72.
Twelfth amendment, 160–161.
Twentieth amendment, 168–169, 308–309.
Twice in jeopardy, 523.
Twining *v.* New Jersey, 480 *n.*

Union calendar, 330.
United States Government Manual, 221 *n*, 241 *n*, 258, 260.
United States Reports, 526 *n.*
United States tariff commission, organization and functions of, 247–248; *The Tariff: A Bibliography*, 433.
United States *v.* Butler et al. (receivers of Hoosac Mills), 254 *n*, 531 *n.*
United States *v.* E. C. Knight Co., 436 *n.*
United States *v.* MacIntosh, 96 *n.*
United States *v.* Rosika Schwimmer, 96 *n.*
United States *v.* Wong Kim Ark, 93 *n.*
Upton, Major-General Emory, *The Military Policy of the United States*, 463.

Vandenbosch, A. *See* Jones, J. Catron.
Van Dyne, F., *Citizenship of the United States*, 104; *Treatise on the Law of Naturalization*, 105.
Van Hise, C. R., *Conservation and Regulation in the United States during the World War*, 463–464.
Van Middeldyk, R. A., *History of Puerto Rico from the Spanish Discovery to the American Occupation*, 505.
Van Vleck, W. C., *The Administrative Control of Aliens*, 433.
Vaughan, F. L., *Economics of Our Patent System*, 476.
Veazie Bank *v.* Fenno, 358 *n.*
Veterans' administration, 251–252.
Veterans, World War, bonus problem of, 457–458.
Veto power, of President, 200–205; frequency of use, 202–203; merits and defects of, 204–205; limitations on, 204–205.
Vice President, reason for the office, 176–177; election of, 157–158; succession to presidency, 177–178; duties of, 178–179; constitutional qualifications of, 179; as presiding officer of Senate, 269.
Virgin Islands, government of, 501.
Voters' lists, compiling, 118–119. *See also* Suffrage.
Voting. *See* Suffrage.

Wagner-Connery labor relations act (1935), 449.
Walker, Harvey, *Lawmaking in the United States*, 334.
Wallace, H. A., *New Frontiers*, 451; *America Must Choose*, 452, 561.
Wallace, Schuyler C., *The New Deal in Action*, 390 *n*, 408, 451.
Wanlass, W. L., *The United States Department of Agriculture*, 239.
War, federal department of, 227–228.
War powers, of Congress, 453–463; exercised by President, 454.
Warburg, Paul M., *The Federal Reserve System*, 259, 408.
Warren, Charles, *The Making of the Constitution*, 59; *Congress, the Constitution and the Supreme Court*, 88, 544; *Congress as Santa Claus*, 386, 476; *The Supreme Court in United States History*, 543; *The Supreme Court and the Sovereign States*, 544.
Warren, G. F., and Pearson, F. A., *The Agricultural Situation*, 452.
Washington, City of. *See* District of Columbia.
Washington, George, quoted, 34, 37; in constitutional convention of 1787, 41, 43, 44; attitude toward party spirit, 123–124; "Farewell Address," 123; on constitution as basis of political system, 335; *Writings of*, edited by L. B. Evans, 124 *n.*
Watson, D. H., *History of American Coinage*, 408.
Watson, D. K., *Constitution of the United States*, 72.
Webb, W. L., *Champ Clark*, 334.
Webb-Kenyon act (1918), 437 *n.*
Weber, G. A., *The Patent Office*, 476.
Webster, Daniel, 45; as counsel second national bank, 393; definition of "due process of law," 481.
Webster, W. C., "The State Constitutions of the American Revolution," 32 *n.*
Weeks act of 1911, 474.
Weights and measures, power of Congress to regulate, 468–469.
West, H. L., *Federal Power: Its Growth and Necessity*, 88, 350, 476.
Weyforth, W. O., *The Federal Reserve Board*, 408.

Whig party, 127–128.
Whipple, Leon, *The Story of Civil Liberty in the United States*, 105.
White, Horace, *Money and Banking*, 408.
White, Howard, *Executive Influence in Determining Military Policy in the United States*, 212, 464.
White, L. D., *The Civil Service in the Modern State*, 211; *The Government Administrative Service*, 211; *Introduction to the Study of Public Administration*, 238; *Trends in Public Administration*, 238.
White, William Allen, *Politics: The Citizen's Business*, 105; *Masks in a Pageant*, 155.
Whiting, William, *War Powers under the Constitution of the United States*, 463.
Wigmore, John H., *Source Book of Military Law and War Time Legislation*, 463.
Wilcox, C., and others, *America's Recovery Program*, 260.
Williams *v.* Mississippi, 110 *n.*
Willis, H. P., *The Federal Reserve System*, 408; and Beckhart, B. H., *Foreign Banking Systems*, 408. *See also* Dunbar, C. F.
Willoughby, W. F., *The Reorganization of the Administrative Branch of the National Government*, 235 *n*, 238; *Principles of Public Administration*, 238; *Principles of Legislative Organization and Administration*, 311–312, 334; *The Financial Condition and Operations of the National Government, 1921–1930*, 368, 383 *n*; *The National Budget System*, 373 *n*, 386; *The Problem of a National Budget*, 386; "Budget" in *Encyclopaedia of the Social Sciences*, 386; *The Legal Status and Functions of the General Accounting Office*, 386; *Government Organization in War Time and After*, 457 *n*, 463; *Territories and Dependencies of the United States*, 505; *Principles of Judicial Administration*, 524; and Rogers, Lindsay, *An Introduction to the Problem of Government*, 374 *n*. *See also* Schmeckebier, L. F.
Willoughby, W. W., *Constitutional Law of the United States*, 72, 336 *n*, 350, 433; *Principles of the Constitutional Law of the United States*, 72.
Wilson, James, quoted, 19; in constitutional convention of 1787, 42, 46; on inconclusive presidential elections, 158; on popular representation, 296 *n*.
Wilson, Woodrow, messages to Congress, 83; on political parties, 140; election of, as President in 1912, 165; legislative activity of, 198; on the Senate, 261; at Versailles peace conference, 282; veto of budget and accounting act, 373; *Constitutional Government in the United States*, 174 *n*, 184 *n*, 208 *n*, 209 *n*, 532; *The President of the United States*, 210; *Congressional Government*, 312.
Wiprud, A. C., *The Federal Farm Loan System in Operation*, 408.
Wisconsin *v.* C. B. & Q. R. R., 423 *n*.
Wise, J. S., *A Treatise on American Citizenship*, 104.
Witte, E. E., *The Government in Labor Disputes*, 452.
Woellner, F. P., *Education for Citizenship in a Democracy*, 105.
Woll, Matthew, *Labor, Industry and Government*, 452.
Woodburn, J. A., *Political Parties and Party Problems in the United States*, 139.
Wooddy, C. H., *The Growth of the Federal Government, 1915–1932*, 238, 476.
Worcester, Dean C., *The Philippines, Past and Present*, 506.
Wordsworth, William, quoted, 278.
Works program and works progress administration, federal, 256.
World Almanac, 386.
World Court, reservations of Senate in connection with, 283, 473 *n*.
World War, effects of, on national expenditures, 373.
Wright, B. F., *Source Book of American Political Theory*, 39, 561.
Wright, Ivan, *Bank Credit and Agriculture*, 408.
Wright, Milton, *Inventions and Patents*, 476.
Wright, Quincy, *The Control of American Foreign Relations*, 194 *n*, 211, 294.
Wriston, H. M., *Executive Agents in American Foreign Relations*, 211.

Yick Wo *v.* Hopkins, 110 *n*.
Young, George, *The Freedom of the Seas*, 464.
Young, James T., *The New American Government and Its Work*, 12, 433.

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